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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1955

No. 765

CITY AND COUNTY OF SAN FRANCISCO, a municipal corporation, et al.,
Petitioners,

vs.

TRANS WORLD AIRLINES, INC., a corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

DION R. HOLM,
City Attorney of the City and County of San Francisco,
THOMAS M. O'CONNOR,
Public Utilities Counsel of the City and County of San Francisco,
FRANK J. NEEDLES,
Deputy City Attorney of the City and County of San Francisco,
206 City Hall, San Francisco 2, California,
Attorneys for Petitioners.

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PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit.

The City and County of San Francisco, petitioner herein, prays respectfully that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit reversing the judgment of the District Court for the

Northern District of California, Southern Division, wherein the Circuit Court of Appeals held that a contract entered into with respondent, Trans World Airlines, Inc., in 1942 *froze* the established rates and charges for the common use facilities at the San Francisco International Airport for a period of twenty years, and that such rates and charges could not be subsequently changed as to respondent, Trans World Airlines, Inc., and that the City and County of San Francisco is not entitled to judgment for the sum of $95,942.64 from and after December 31, 1950 to February 28, 1954, in accordance with the lawfully established rates and charges fixed by the Public Utilities Commission of petitioner and paid for by all air carriers, with two exceptions, using the common use facilities at the municipal airport.

JURISDICTION.

The judgment of the Court of Appeals for the Ninth Circuit was filed and entered on December 19, 1955. (Exhibit "B".) A petition for rehearing was filed on January 16, 1956; an order denying rehearing was filed on January 31, 1956; an application for a stay of mandate was filed on February 2, 1956, and the mandate was by said Court of Appeals ordered stayed on February 3, 1956, until March 5, 1956, and on February 29, 1956, until March 19, 1956 or until disposition of this petition.

The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

OPINIONS BELOW.

The opinion of the Court of Appeals appears in the appendix of this petition as Exhibit "A"; and the opinion of the District Court for the Northern District of California, Southern Division (119 Fed. Supp. 516), appears in the appendix of this petition as Exhibit "C".

STATEMENT OF THE CASE.

In 1926 the voters of the City and County of San Francisco approved an initial appropriation of $100,000 for the construction of an airport. Since that date, $50,000,000 of its taxpayers' money has been invested in the San Francisco International Airport to make it one of the great air gateways of the world. Twelve scheduled air carriers (American Airlines, Canadian Pacific, Ltd., Flying Tiger Line, Inc., Japan Airlines, Pacific Southwest Airlines, Pan American World Airways, Qantas, Slick Airways, Inc., Southwest Airways Co., Trans World Airlines, Inc., United Airlines, and Western Airlines, Inc.) have been certificated to use this airport and its terminal facilities. Also, there are numerous non-scheduled carriers and private planes using the terminal facilities. All aircraft *use in common* the runways where planes land and take off; the landing aprons, or ramps, where passengers and cargo are taken on and discharged; the taxiways which connect the runways with the landing aprons or ramps; and other conveniences and facilities, such as lights, sig-

nals, beacons and control tower services. These are designated the common use facilities of the airport.

In 1941 petitioner, through its Public Utilities Commission, duly enacted a schedule of rates and charges for the common use facilities at the municipal airport, which were applicable to all air carriers using the facilities of its airport. The schedule of rates and charges was fixed in accordance with Section 130 of the Charter of the City and County of San Francisco.

Subsequent to the enactment of the schedule of rates and charges, the petitioner in 1942 entered into a contract with respondent, Trans World Airlines, Inc., for certain land area, hangar facilities and counter space for the sale of tickets in the terminal building. The term of said contract was for twenty years. Included in the contract was a schedule of rates and charges *for the common use facilities* which were identical, an exact transcription, in words and figures, with the rates and charges set forth in the duly enacted schedule of 1941 adopted by the Public Utilities Commission of petitioner under Section 130 of the Charter of the City and County of San Francisco.

Incorporated in the agreement was this provision, and it is fully set forth hereafter to emphasize its importance in the controversy at bar. Section 3 of the agreement states:

> *"Lessor further demises and lets unto Lessee the use, in common with others authorized so to do and on the same terms and conditions as apply to others, of any and all general facilities, im-*

provements, equipment and services which have been or may hereafter be provided at said San Francisco Municipal Airport, including, but without limitation, the landing field, runways, aprons, taxi-ways, sewerage and water facilities, marker and surface lights, floodlights, landing lights, signals, beacons, aids, control tower, and other conveniences for loading, flying, landings, and take-offs; and the causeways, docks, wharves and approaches thereto, parking areas, roads, streets, bridges, spur tracks, and other facilities and appurtenances of said Airport, for the Lessee, its employees, passengers, guests, vendors and contractors, patrons, and invitees, which use, without limiting the generality thereof, shall include (all of said facilities to be used and occupied in accordance with the rules and regulations of said Airport):"

In 1946 the City, after extensive costly improvements to the common use facilities fixed a new schedule of rates and charges after due notice by publication in a daily newspaper, public hearing, and proceedings before the Board of Supervisors in accordance with Charter Section 130. (Exhs. S-1, S-2, S-3, S-4, R. 624.)

Again, on November 12, 1950, and after further extensive improvements including a new terminal building then under construction, the petitioner's Public Utilities Commission adopted a schedule of rates and charges after due notice by publication and hearing for the use of the common use facilities at the Airport in accordance with Section 130 of the Charter. Said schedule was approved by the Board

of Supervisors of the City and County of San Francisco and became effective on January 1, 1951. (Exh. "E", R. 55; Exhs. T-1, T-2, T-3, T-4, R. 625.)

Respondent, Trans World Airlines, Inc., brought this action for declaratory relief and injunction in the United States District Court for the Northern District of California, Southern Division.

The District Court ruled in accord with petitioner's legal conclusions that the furnishing of common use facilities at the San Francisco International Airport constituted a public utility service; that the Public Utilities Commission of petitioner had rate-making jurisdiction over the airport; and that the law does not allow a public utility to depart from the regular schedule of rates and charges by contract whereby one consumer (TWA) would be given a preference over other competing consumers in the same class.

The Court of Appeals, in reversing the decision of the District Court, substantially adopted the respondent's contentions, and held that the operation of the San Francisco International Airport was not a municipal affair, rather it was a federal or state affair; that petitioner was governed by the State Municipal and County Airport Act of 1927 rather than its Charter of 1900 and its new Charter of 1932; that since the Municipal and County Airport Act of 1927 permitted contracts with air carriers for facilities at municipally owned airports, the City and County of San Francisco was bound by the terms of the contract of 1942, and the rates for the common use facilities were *frozen* for the duration of the contract (twenty

years); and that the City and County of San Francisco had by its action in entering into the contract of 1942 suspended its rate-making authority as to respondent, Trans World Airlines, Inc. Further, the Court of Appeals failed to rule on the question whether in the operation of its airport, petitioner is operating a public utility.

REASONS FOR ALLOWANCE OF THE WRIT AND QUESTIONS PRESENTED FOR REVIEW.

1. The Court of Appeals has decided an important state question in conflict with applicable state law, in that its decision is contrary to numerous state appellate and Supreme Court decisions, holding that the operation of municipally owned utilities is a "municipal affair" within the meaning of a state constitutional provision giving a municipal corporation operating under a freeholders' charter governmental authority over municipal affairs to the exclusion of the state legislature.

2. The Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court, in that said Court has ruled that the operation of the said airport is not a municipal affair, but rather a state or federal affair, and by so deciding, has raised the question of whether the Civil Aeronautics Board has jurisdiction to regulate rates and charges for common use facilities at airports serving interstate air carriers.

3. The Court of Appeals has decided a federal question in a way in conflict with applicable decisions of this Court, in that by this decision the Court of Appeals permits petitioner to discriminate among the several air carriers as to rates and charges for common use facilities at the said airport.

4. The Court of Appeals has rendered a decision in conflict with the decision of another Court of Appeals on the same matter, by failing to remand this case to the District Court to await exhaustion of the administrative remedy available to TWA before the Civil Aeronautics Board.

All of the foregoing questions are of nationwide importance and some are questions of first impression. Every municipality throughout the United States which operates an airport and every air carrier will be affected by the decision in this case, for the problem of rates and charges for common use facilities is common to all, although in each case the problem is colored by varying local statutes, constitutional and substantive provisions.

The petitioner, air carriers, cities, counties and states throughout the nation seek a final judicial determination regarding the nation's network of airports by an answer to the questions as herein presented.

I.

IN THE OWNERSHIP OF A MUNICIPAL AIRPORT, VIRTUALLY WHOLLY PAID FOR BY PETITIONER'S TAXPAYERS' MONEY, IS THE PETITIONER OPERATING A PUBLIC UTILITY, WHICH REQUIRES EQUAL, UNIFORM AND NON-DISCRIMINATORY CHARGES FOR ALL AIR CARRIERS ENGAGED IN FOREIGN INTERSTATE AND INTRASTATE AIR COMMERCE USING THE SAME COMMON USE FACILITIES, REGARDLESS OF PURPORTED FIXED CHARGES SET FORTH IN A CONTRACT BETWEEN PETITIONER AND RESPONDENT?

A. The Operation of a Municipally Owned Airport, Especially the Common Use Facilities, Is a Public Utility Business.

Of prime importance to the whole aviation industry, air carriers, airport operators and the Civil Aeronautics Administration is whether the operation of an airport is within the public utility field. The question has been presented in various state Courts and slightly referred to in federal determinations. If the operation of an airport is a public utility, no preference for rates or charges can be given to one air carrier over another in the same class.

In the instant case, the decision of the Court of Appeals would permit twelve contracts varying as to rates and charges between the petitioner and its customers using the common use facilities at the municipal airport; or, it would permit petitioner by contract to give a preference to respondent for the common use facilities as against air carriers in direct competition with respondent. The District Court (119 Fed. Supp. 516) determined that all air carriers using the common use facilities must be treated on a non-discriminatory basis since the operation of the San Francisco International Airport is a public utility business.

A review of the law in all jurisdictions where the question has been presented definitely holds that the operation of an airport by a municipality or other governmental agency is within the public utility field. See:

State v. Jackson (1929), 121 Ohio St. 186, 167 N.E. 396;

Jones v. Keck (1946), 74 Ohio App. 549, 74 N.E. 2d 644, 646;

State ex rel. City of Lincoln v. Johnson (1928), 117 Neb. 301, 220 N.W. 273, 274;

Price v. Storms, et al., Board of Trustees (1942), 191 Okla. 410, 130 Pac. 2d 523;

City of Toledo v. Jenkins (1944), 143 Ohio St. 141, 54 N.E. 2d 656;

State v. Board of County Commissioners (1947), 149 Ohio St. 583, 79 N.E. 2d 698;

Annotation, 161 A.L.R. 733.

In *Air Transport Association v. United States* [(1955), 9th C.C.A.], 221 Fed. 2d 467, the Court held that the United States in the operation of the Elmendorf Field in Alaska was engaged in a "public enterprise."

Respondent argues that the operation of the airport and especially the promulgation of rates and charges for the common use facilities is not a public utility function. If respondent's argument were true, petitioner could forbid any air carrier from landing at the San Francisco International Airport. It could, at the termination of the contract of 1942, charge respondent any amount it so desired for landing and takeoff charges, the use of taxiways, ramps and other

facilities. In other words, regardless of the provisions of the Civil Aeronautics Act of 1938, as amended, whereby respondent received a certificate of public convenience and necessity to serve Chicago, Illinois, and San Francisco on a nonstop flight schedule, petitioner, according to the argument of respondent, could forbid respondent from landing and taking off at the airport, or charge it six times more than it does American Airlines for the same privilege over the same route.

That the San Francisco International Airport is a public utility is fully recognized by the laws of the State of California and the Charter of the City and County of San Francisco.

Section 10001 of the Public Utilities Code of the State of California defines "public utilities" as it pertains to municipalities in these words:

> "'Public utility' defined. 'Public utility' as used in this article, means the supply of a municipal corporation alone or together with its inhabitants, or any portion thereof, with water, lights, heat, power, *transportation of persons or property,* means of communication, *or means of promoting the public convenience.*" (Emphasis added.)

Section 10004 provides:

> "Incidental powers included in power to acquire and operate public utility. For the purpose set forth in Sections 10002 and 10003 a municipal corporation may acquire, own, control, sell or exchange lands, easements, licenses, and rights of every nature within or without its corporate limits, *and may operate a public utility within or*

without the corporate limits when necessary to supply the municipality, or its inhabitants or any portion thereof, with the service desired." (Emphasis added.)

Section 120 of the Charter of the City and County of San Francisco creates a public utilities commission in the municipal government of the City and County of San Francisco.

Section 121 of the Charter provides in part that:

> "The public utilities commission shall have charge of the construction, management, supervision, maintenance, extension, operation and control of all public utilities and other properties used, owned, acquired, leased or constructed by the city and county, *including airports,* for the purpose of supplying any public utility service to the city and county and its inhabitants, to territory outside the limits of the city and county, and to the inhabitants thereof." (Emphasis added.)

Section 122 of the Charter enacts that utilities therein named, among which is the airport, "shall each be designated as a department under the commission."

Section 125 of the Charter provides, in part:

> "The public utilities commission shall have jurisdiction over the airport now being conducted by the City and County of San Francisco, . . ."

It must be concluded, therefore, that petitioner under federal, state, and City Charter provisions, in the operation of the San Francisco Municipal Airport, is engaged in a public utility business.

B. The Petitioner in the Operation of a Public Utility (Airport) Is Required to Charge Equal, Uniform and Non-discriminatory Charges for All Air Carriers Engaged in Interstate Air Commerce Using the Same Common Use Facilities at the Airport.

The fundamental principle of utility law, as adopted by the District Court, that all customers (air carriers) are to be charged equally and uniformly, without discrimination, for the use of the common use facilities at San Francisco International Airport, petitioner submits is the recognized law of the United States. This principle is set forth in the enactment of the Civil Aeronautics Act of 1938, as amended.

The aircraft of all air carriers, scheduled and non-scheduled, and all private aircraft are entitled, as a matter of law, to land and take off from the San Francisco International Airport.

The provisions of the Public Utilities Code of the State of California, and the case law of the Supreme Court of the United States and California all emphasize this principle.

Section 21637, Public Utilities Code of the State of California (Stats. of 1953, Chapter 151, §1) provides:

> "In no case shall the public be deprived of its rightful equal and uniform use of the airport, or navigation facilities, or portion of either."

49 U.S.C., Section 1110, provides:

> "The airport to which the provision relates will be available for public use on fair and reasonable terms *and without unjust discrimination.*" (Emphasis added.)

And in the enactment of the Civil Aeronautics Act of 1938, as amended, the Congress of the United States stated in the Declaration of Policy establishing the Civil Aeronautics Board, 49 U.S.C., Section 402:

> "In the exercise and performance of its powers and duties under this chapter, the board shall consider the following, among other things, as being in the public interest and in accordance with the public convenience and necessity.
>
> " . . .
>
> "(c) The promotion of adequate, economical and efficient service by air carriers at reasonable charges, *without unjust discrimination, undue preferences or advantages, or unfair or destructive competitive practices.*" (Emphasis added.)

49 U.S.C., Section 484(b), provides:

> "No air carrier or foreign air carrier shall make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, locality, or description of traffic in air transportation in any respect whatsoever *or subject any particular person, port, locality, or description of traffic in air transportation to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever.*" (Emphasis added.)

The Supreme Court of the United States has uniformly held that there can be no discrimination or discriminatory practices or preferences indulged in by carriers in interstate commerce, whether by rail, shipping or otherwise.

Baltimore & O. R. Co. v. United States (1939), 305 U.S. 507, held that where an interstate carrier's warehouse rates were not open to all shippers alike there was a violation of the Interstate Commerce Act.

In *United States v. Baltimore & O. R. Co.* (1948), 333 U.S. 169, this Court stated:

> "The Interstate Commerce Act is one of the most comprehensive regulatory plans that Congress has ever undertaken. The first act, and all amendments to it, have aimed at wiping out discriminations of all types. New York v. United States, 331 U.S. 284, 296, 91 L. ed. 1492 on 1507, 67 S. Ct. 1207.
>
> "It would be strange if this legislation left a way open whereby carriers could engage in discrimination merely by entering into contracts for the use of trackage. In fact this court has long recognized that the purpose of Congress to prevent certain discriminations and prejudicial practices could not be frustrated by contracts even though the contracts were executed before enactment of the legislation."

Kansas City, Kansas, attempted to give preferential rates to tenants in its new terminal building. The Supreme Court of Kansas, in *Kansas and State ex rel. Parker v. Kansas City,* 151 Kan. 1, 97 Pac. 2d 104, held that the city had the authority to indulge in such preferential practices. However, this practice was enjoined as a violation of the Elkins Act in *Union Pacific Railroad Co. v. United States* (1941), 313 U.S. 450.

The action of the Maritime Commission in forbidding preferential treatment and establishing uniform demurrage charges on wharves in San Francisco and in the City of Oakland was upheld by the Court in *California v. United States* (1943), 320 U.S. 577.

The California Supreme Court has repeatedly held that public utility rates must be uniform, equal and nondiscriminatory.

Limoneira Co. v. Railroad Commission (1917), 174 Cal. 232;

Leavitt v. Lassen Irrig. Co. (1909), 157 Cal. 82;

Spring Valley Water Co. v. San Francisco, 61 Cal. 3;

San Diego Water Co. v. San Diego (1897), 118 Cal. 556;

City of Pasadena v. Railroad Commission (1920), 183 Cal. 526.

Also, Annotation in:

74 L. Ed. 234, et seq.

C. The Contract of 1942 Between Petitioner and Respondent, Although Valid When Made, Was Always Subject to Regulation.

There is no dispute as to the validity of the contract entered into in 1942 between petitioner and respondent. The rates for the *common use facilities* set forth in the contract were the valid rates for all air carriers using the same common use facilities at the San Francisco International Airport as duly enacted by petitioner in 1941.

The Court of Appeals and respondent would divest the Public Utilities Commission of petitioner from ever changing the rates for the public utility service, i.e., the common use facilities, during the life of the contract.

When the Public Utilities Commission duly enacted a new schedule of rates in 1946 and again in 1950 for the common use facilities at the airport, the contract of 1942 between petitioner and respondent was subjected to the new regulations governing charges.

In the instant case, the only governmental agency that had the power to regulate the public utility rates for the common use facilities was the Public Utilities Commission of petitioner under Section 130 of the Charter of the City and County of San Francisco.

Section 130 provides, in part:

> "The commission shall have power to fix, change and adjust rates, charges or fares for the furnishing of service by any utility under its jurisdiction, and to collect by appropriate means all amounts due for said service, and to discontinue service to delinquent consumers and to settle and adjust claims arising out of the operation of any said utilities.
>
> "Rates may be fixed at varying scales for different classes of service or consumers. The commission may provide for the rendition of utility service outside the limits of the city and county and the rates to be charged therefor which may include proportionate compensation for interest during the construction of the utility rendering such service."

Respondent was charged with the knowledge that the common use facilities were always subject to regulation by the proper governmental agency.

It is a fundamental principle of utility law, where the law authorizes the regulation of service (common use facilities) rendered the public, that such law becomes a part of and controls contracts providing for the public service.

In re Cortaro Water Co. (1933), 3 Fed. Supp. 257;

17 C.J.S., §330, p. 784;

Pinney & Boyle v. Los Angeles (1914), 168 Cal. 12;

Law v. Railroad Commission (1921), 184 Cal. 737;

Leavitt v. Lassen Irrigation Co. (1909), 157 Cal. 82;

Limoneira Co. v. Railroad Commission (1917), 174 Cal. 232;

Mott v. Cline (1927), 200 Cal. 434;

Midland Realty Co. v. Kansas City Power & Light (1936), 300 U.S. 109;

Union Drygoods Co. v. Georgia Public Service Corp. (1919), 248 U.S. 372;

Railroad Commission v. Los Angeles Railway (1929), 280 U.S. 145, 152.

Also:

Annotation, 74 L. Ed. 234, reviewing both California and Federal cases on this subject.

II.

IN THE OWNERSHIP OF A MUNICIPAL AIRPORT, IS PETITIONER BY ITS CHARTER AND STATE LAW OPERATING THIS PUBLIC UTILITY AS A MUNICIPAL AFFAIR?

Where a municipality avails itself of the provisions of Article XI, Sections 6 and 8, of the California Constitution, and becomes a chartered city, or being a chartered city, or city and county, adopts a new charter (as San Francisco did by adopting a new charter in effect January 8, 1932), its powers over municipal affairs become all embracing, restricted and limited by the Charter only, and free from any interference by the State through general laws. In fact, the Charter supersedes all existing State laws on the same subject matter. *The city becomes independent of general laws upon municipal affairs.*

West Coast Advertising Co. v. San Francisco (1939), 14 Cal. 2d 516, 95 Pac. 2d 138;

Kennedy v. Ross (1946) 28 Cal. 2d 569, 170 Pac. 2d 904.

Under the provisions of Article XI, §19 of the State Constitution adopted in 1911 an airport is a "municipal affair." The first sentence of §19 of Article XI provides:

> "Any municipal corporation may *establish and operate* public works for supplying its inhabitants with light, water, power, heat, *transportation,* telephone service *or other means of communication.*" (Emphasis added.)

An airport is a public work for supplying inhabitants of the municipality with transportation within

the meaning of the constitutional provision. This is made clear in an interpretation by the State Supreme Court of the provisions of Section 20 of Article XII of the California Constitution also adopted in 1911 relative to the powers of the State Public Utilities Commission, in *People v. Western Airlines,* 42 C. 2d 621.

In that case, Western challenged the jurisdiction of the State Public Utilities Commission to establish intrastate rates for airline passengers on the ground that Article XII, §20 of the Constitution which conferred upon the Commission power over the rates of "transportation companies" did not include airline companies. The Court, at page 635 stated as follows:

> "The fact that airline transportation companies were not in existence when the Constitution was adopted in 1879 does not make them any the less 'transportation companies' within the meaning and contemplation of article XII. It was well said by the Supreme Court of Nebraska in *State ex rel. State Railway Com. v. Ramsey* (1949), 151 Neb. 333, at page 338 (37 N.W. 2d 502): '. . . A Constitution is intended to meet and be applied to any conditions and circumstances as they arise in the course of the progress of the community. The terms and provisions of constitutions are constantly expanded and enlarged by construction to meet the advancing affairs of men. While the powers granted thereby do not change, they do apply in different periods to all things to which they are in their nature applicable. *Pensacola Telegraph Co. v.*

Western Union Telegraph Co., 96 U.S. 1, 24 L.Ed. 708; 11 Am. Jur., Constitutional law §51, p. 660; 9 Am. Jur., Carriers, §4, p. 430. These principles have been held to be applicable to transportation by air. "Transportation, as its derivation denotes, is a carrying across, and, whether the carrying be by rail, by water or by air, the purpose in view and the thing done are identical in result." *Curtiss-Wright Flying Service v. Glose*, 66 F. 2d 710, certiorari denied 290 U.S. 696 [154 S.Ct. 132, 78 L. Ed. 599] . . . [citations omitted].'"

Therefore, under Article XI, §19, San Francisco was given the direct constitutional grant to establish and *"operate"* an airport.

As heretofore pointed out, Sections 121, 122, 125, and 130 of the Charter of the City and County of San Francisco are the controlling laws as far as petitioner is concerned in its operation of the airport.

These sections make the airport a public utility under the jurisdiction of petitioner's Public Utilities Commission. Section 130 makes it mandatory for the Public Utilities Commission to establish rates and charges for the furnishing of services by any utility under its jurisdiction.

The City owns its own water system, which serves San Francisco, parts of Alameda County and most of the San Francisco Peninsula area. This water system links San Francisco with other areas and serves neighboring and outlying communities; its aqueducts and pipe lines stretch 150 miles from the

high Sierras through the Coast Range to San Francisco. That the State of California is greatly concerned with water is evidenced by a separate water code which legislates for over fifty water agencies. The use and control of water is more of a statewide affair than airports.

However, municipally owned water systems are municipal affairs under the jurisdiction of the municipality, *and not subject to State regulation.*

See:

South Pasadena v. Pasadena L. & W. Co., 152 Cal. 579, 93 Pac. 490;

City of Pasadena v. Railroad Commission, 183 Cal. 526, 192 Pac. 25;

Jochimsen v. Los Angeles, 54 C.A. 715, 202 Pac. 902.

If municipally owned water, light, heat and power systems are "municipal affairs", it necessarily follows that a municipally owned airport is a "municipal affair."

On the other hand all *private* public utility water systems are under the jurisdiction of the Public Utilities Commission of the State. In fact *all* private public utilities are subject to the jurisdiction of the State Public Utilities Commission.

The State Supreme Court long ago ruled that municipally owned utilities were not under the jurisdiction of the State Public Utilities Commission. This was amply pointed out by the Court in *Durant v. City of Beverly Hills* (1940), 39 C.A. 2d 133, 137, 102 P. 2d 759.

And, in *Polk v. City of Los Angeles* (1945), 26 Cal. 2d 519, 539, 150 Pac. 2d 931, our Supreme Court states:

> "The present Railroad Commission (now Public Utilities Commission) was created by an amendment to the Constitution on October 10, 1911 (Cal. Const., Art. XII §22). Thereafter it was held that the powers conferred on the commission did not extend to the regulation of utilities operated by municipalities; that its power of regulation was limited to privately operated public utilities; and that the Legislature could not extend that power to embrace municipally operated utilities."

See also:

City of Pasadena v. Railroad Com. (1920), 183 Cal. 526, 192 P. 25;

Bowles v. City and County of San Francisco (1946), 64 Fed. Supp. 609;

Jochimsen v. City of Los Angeles (1921), 54 C.A. 715, 202 P. 902.

The City cited both *Krenwinkle v. City of Los Angeles* (1935), 4 Cal. 2d 611, and *Ebrite v. Crawford* (1932), 215 Cal. 724, to show that the California Supreme Court regarded the operation of an airport as a "municipal affair". The Court of Appeals misconstrued the purpose of the citations and stated:

> "These cases support the view that the conduct of a municipal airport is a matter subject to State Law."

San Francisco acquired its airport in 1926 prior to the amendment of the Municipal and County Air-

port Law (Cal. Stats. 1927, p. 458). The airport was not acquired under the State Airport Act as in the *Krenwinkle* and *Ebrite* cases, supra. The City's airport came into being under the provisions of California Statutes of 1911, Chapter 715, and Article XII of the Charter of 1900, as amended. It was acquired as a public utility, just as the City acquired the Spring Valley Water System, Market Street Railway Company, and the California Street Cable Railroad Company.

The fact that the Municipal and County Airport Law refers to "any such city and county" (San Francisco being the only combined City and County in the State) is of no significance, since the airport was already established by petitioner prior to enactment of the Municipal and County Airport Law. The real question is whether the statute regulates a matter of statewide concern or attempts to regulate a municipal affair contrary to the provisions of Article XI, §6 of the California Constitution. On two occasions, where municipal affairs were involved, California Courts have ruled that the San Francisco charter and ordinance provisions prevail over general statutes, in spite of the fact that the statutes involved were addressed to "every city, or city and county" (*Burke v. Board of Trustees, etc.*, 4 Cal. App. 235), and to each contractor awarded a construction contract "by any county, city and county, city, town or district therein". (*Loop Lumber Co. v. Van Loben Sels, et al.*, 173 Cal. 228).

We have diligently searched the law in the State of California and have been unable to find a *single case* holding that where a municipality owns and operates its own public utility, it is not a municipal affair under the jurisdiction of the owner-municipality.

Of main importance to the issue at bar and completely overlooked by the Court of Appeals was the ratification of the new Charter of the City and County of San Francisco in 1932 by the State Legislature.

The District Court pointed out that "the approved charter of a municipality is a law of the state and has the same force and effect as a law enacted by the Legislature." (Citing *Yosemite Etc. v. State Board of Equalization* (1943), 59 Cal. App. 2d 39.)

The City agrees that when the contract was entered into in 1942 with TWA it was a valid contract. That contract, however, embodied every provision of rates and charges for common use facilities at the airport under the legal schedule adopted in 1941 by the City, under its Charter powers. The City at the time of the contract was controlled by its Charter of 1932 and not the general Municipal and County Airport Law of 1927, which applied to cities and counties that had not legislated on the same subject matter.

Home Telephone Co. v. Los Angeles, 211 U.S. 265, emphasizes that a City must have express power through its charter to contract as to rates. No such power is given to the petitioner through its Charter.

The interpretation of what can and cannot be done by authorities operating airports, especially "common use facilities" is ably expressed by the Court in *Hillsborough County Aviation Authority v. National Airlines* (1953), 63 So. 2d 61, 40 A.L.R. 2d 1056.

The contract of 1942 was valid when entered into because the rates and charges set forth in the contract were the valid rates for the "common use facilities". Those rates applied to all air carriers—not to TWA alone. If the rates set forth in the contract *were special rates* and not subject to further regulation by the City, as a matter of law, the contract was *ultra vires,* for the City is not empowered to divest itself of its police power.

Commencing with the leading case of *Hesse v. Rath,* 249 N.Y. 435, 164 N.E. 342, it has universally been held by the Courts that a City which owns and operates an airport performs this function as a matter of local concern and is governed by the law applicable to matters which concern the municipality exclusively as a "local concern" or "municipal affair."

Mr. Justice Cardozo stated in the *Hesse v. Rath* case:

> "A city acts for city purposes when it builds a dock or a bridge or a street or a subway. (*Sun Printing & Pub. Ass'n v. New York,* 152 N.Y. 257, 46 N.E. 499, 37 L.R.A. 788) *Its purpose is not different when it builds an airport.* (*Wichita v. Clapp,* 125 Kan. 100, 263 Pac. 12, 63 A.L.R. 478) Aviation is today an established method of

transportation. The future—even the near future—will make it more general. The city that is without the foresight to build the ports for the new traffic may soon be left behind in the race of competition." (Emphasis added.)

Numerous other jurisdictions hold that the maintenance and operation of municipal airports are for a municipal purpose and are municipal affairs. See:

City of Wichita v. Clapp, 125 Kan. 100, 263 Pac. 12;

Dysart v. St. Louis, 321 Mo. 514, 11 S.W. 2d 1045;

City of Ardmore v. Excise Board, 155 Okla. 126, 8 Pac. 2d 2;

State v. Clausen, 157 Wash. 457, 289 Pac. 61;

City and County of Denver v. Board of Commissioners, 113 Colo. 150, 156 Pac. 2d 101.

III.

IF THE OWNERSHIP OF THE AIRPORT IS NOT A MUNICIPAL AFFAIR UNDER THE CONTROL OF PETITIONER, IS IT A FEDERAL AFFAIR UNDER THE CIVIL AERONAUTICS ACT OF 1938, AS AMENDED, DIVESTING THE FEDERAL COURTS OF JURISDICTION UNTIL ADMINISTRATIVE REMEDIES HAVE BEEN EXHAUSTED?

Assuming without admitting, that the Court of Appeals is correct, that petitioner can enter into a contract giving a preference of rates and charges for the common use facilities at the airport, the City submits that such a contract must first be approved by the

Civil Aeronautics Board, since it would be a "federal affair."

The evidence is uncontradicted that the contract in question gives to TWA lower rates for the common use facilities than those charged to ten other air carriers using the same common use facilities.

In *S. S. W., Inc. v. Air Transport Ass'n of America* [CADCC (1955)], 191 Fed. 2d 658, the basis of the complaint was that American Airlines, TWA, Braniff Airlines, Colonial Airlines, Eastern Airlines, Capital Airlines, Northwest Airlines, Pan American Airlines and United Airlines had entered into an agreement which violated the anti-trust laws. The Court ruled that recourse must first be sought through the Civil Aeronautics Board, and remanded the case to the District Court until the Civil Aeronautics Board had determined if the contract in question was violative of the provisions of the Civil Aeronautics Act of 1938, as amended.

The Court stated (p. 661):

> "The aircraft industry, like railroads and power, is one in which Congress has decided that the public interest is best served, not by free competition, but rather by direct and uniform regulation by an 'agency authorized to supervise almost every phase of the regulated company's business.'"

The Court further states (p. 662):

> "It provides that 'Every air carrier shall file with the Board a true copy, or, if oral, a true and complete memorandum, *of every contract or*

agreement (whether enforceable by provisions for liquidated damages, penalties, bonds, or otherwise) affecting air transportation and in force on the effective date of this section or hereafter entered into, or any modification or cancellation thereof, between such air carrier and any other air carrier, foreign air carrier, or other carrier *for pooling or apportioning earnings, losses, traffic, service, or equipment, or relating to the establishment of transportation rates, fares, charges, or classifications, or for preserving and improving safety, economy, and efficiency of operation, or for controlling, regulating, preventing, or otherwise eliminating destructive, oppressive, or wasteful competition, or for regulatory stops, schedules, and character of service, or for other cooperative working arrangements.*" (Emphasis added.)

In the case at bar there is no showing that TWA had its contract approved by the Civil Aeronautics Board by which it claims it is entitled to a preference in rates for the common use facilities as against the other air carriers using the same facilities under rates and charges legally promulgated by the Public Utilities Commission of the City.

The Civil Aeronautics Act provides for detailed and comprehensive economic regulation by the Board. It has control of certificates of public convenience and necessity (49 U.S.C., Section 481); supervision of rates and services (49 U.S.C., Section 484); authority over mail rates (49 U.S.C., Section 486); loans and financial aid from United States agencies (49 U.S.C., Section 490) and pooling or other agreement (49 U.S.C. 492).

Further, the Board is empowered to initiate or hear complaints of "unfair or deceptive practices or unfair methods of competition in air transportation," and to issue cease and desist orders against such practices or methods of competition. (49 U.S.C., Section 491.)

Under the Airport Development Act, 49 U.S.C., Section 1110 provides:

> "As a condition precedent to his approval of a project under this chapter, the Administrator shall receive assurances in writing, satisfactory to him, that—(1) the airport to which the project relates will be available for public use on fair and reasonable terms and *without unjust discrimination.*" (Emphasis added.)

In *S. S. W., Inc. v. Air Transport Ass'n of America,* supra, the Circuit Court remanded the case to the District Court, as being consistent with *General American Tank Car Corp. v. El Dorado Terminal Co.* (1940), 308 U.S. 422, 433; 60 S.Ct. 325, 331; 84 L. Ed. 361, in which this Court said:

> "When it appeared in the course of the litigation that an administrative problem, committed to the Commission, was involved, the Court should have stayed its hand pending the Commission's determination of the lawfulness and reasonableness of the practices under the terms of the Act. There should not be a dismissal but . . . the cause should be held pending the conclusion of an appropriate administrative proceeding."

If the operation of the airport is a federal affair, then, under the Civil Aeronautics Act, the Civil Aero-

nautics Board is a regulatory body with powers analogous to those of the Interstate Commerce Commission and the Maritime Commission.

The contract giving respondent, TWA, preferences over other air carriers using the common use facilities at the San Francisco International Airport should be approved by the Civil Aeronautics Board before the federal Courts take jurisdiction of the matter, and the case at bar should be remanded to the District Court until such time as a ruling is made by the Civil Aeronautics Board, upon the right of the City to enter into a contract giving preferential rates to TWA and regulating the rates for the same facilities for ten other scheduled air carriers. (*S. S. W., Inc. v. Air Transport Ass'n of America, et al.*, 191 Fed. 2d 658.)

We submit that if the matter before this Court is a "federal affair" the primary jurisdiction rests in the Civil Aeronautics Board. Petitioner still emphasizes that the only logical and legal jurisdiction in the instant case rests in petitioner's Public Utilities Commission.

IV.

IF THE OPERATION OF THE AIRPORT IS NEITHER A MUNICIPAL NOR FEDERAL AFFAIR, IT MUST BE A STATE AFFAIR CONTROLLED BY THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, AND THIS COURT IS WITHOUT JURISDICTION.

Regulatory power must rest in some governmental body if discrimination in the use of facilities common

to all air carriers is to be avoided. The City insists that under Section 130 of the Charter it is empowered to regulate the rates and charges for the common use facilities at the airport.

The Court of Appeals in reviewing the *Krenwinkle* and *Ebrite* cases, supra, states:

> "These cases support the fact that the conduct of municipal airports is a matter subject to state law."

Assuming, without admitting, that the operation of an airport by a municipality is a "state affair", the contract in question as to the common use facilities would be *ultra vires,* since it gives preference to respondent, TWA.

Section 453 of the Public Utilities Code of the State of California provides:

> "§453. *Preferential rates prohibited.* No public utility shall, as to rates, charges, service, facilities, or in any other respect, make or grant any preference or advantage to any corporation or person or subject any corporation or person to any prejudice or disadvantage. No public utility shall establish or maintain any unreasonable difference as to rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service. The commission may determine any question of fact arising under this section."

Section 728 provides:

> "§728. *When fixing of rates by commission required.* Whenever the commission, after a hear-

ing, finds that the rates or classifications, are * * * discriminatory, or preferential, the commission shall determine and fix by order, the just, reasonable, or sufficient rates, classifications, rules, practices, or contracts to be thereafter observed and in force."

If the State owned or *controlled* the airport, the contract in the instant case would be void. Section 21637 of the California Public Utilities Code provides, in part:

> "§21637. *Contracts, etc., for operation of airports, etc.* * * * In each case the commission may establish the terms and conditions and fix the charges, rentals, or fees for the privileges or services, which shall be reasonable and uniform for the same class of privilege or service and shall be established with regard to the property and improvement used and the expenses of operation to the State. In no case shall the public be deprived of its rightful, equal, and uniform use of the airport, air navigation facility, or portion of either. The commission shall grant no exclusive privilege for the sale or delivery of gasoline or other petroleum products."

If the regulation of rates and charges of common use facilities that respondent TWA complains is in violation of the contract of 1942 and the question is a "state affair", according to the decision of the Court of Appeals, then Section 1702 of the California Public Utilities Code provides respondent TWA its remedy.

However, petitioner still emphasizes that the only logical and legal jurisdiction rests in petitioner's Public Utilities Commission.

CONCLUSION.

The question involved in this controversy is a conflict between federal, state and municipal jurisdiction over the regulatory power to set rates and charges for public utility services, i.e., common use facilities at a municipally owned airport.

The answer to the problem is novel, difficult and important not only to petitioner and respondent, but to all municipalities throughout the Nation, the air carriers, States and the Civil Aeronautics Board.

Jurisdiction must rest *somewhere,* either in the city that owns and operates the airport under its charter; in the State, under the general laws vesting jurisdiction in its public utilities commission; or in the Federal Government, under the Civil Aeronautics Act of 1938, as amended.

Jurisdictional conflict exists between the federal, state and local authorities.

The federal Court in *S. S. W., Inc. v. Air Transport Ass'n of America* (1951), 191 Fed. 2d 658, stated, in the matter of violation of the anti-trust laws, that jurisdiction rests with the Civil Aeronautics Board.

The Court of Appeals in the case at bar leaves the question so vague that it cannot be determined

whether the federal, state or local authority has jurisdiction.

In *People v. Western Airlines,* 42 Cal. 2d 622, the Supreme Court of California ruled that as to intrastate fares, the Public Utilities Commission of the State was the proper regulatory body.

In the case at bar, the District Court, 119 Fed. Supp. 516, stated that the operation of the airport was a public utility and the regulation of the common use facilities was a public utility function under the regulatory power of the petitioner through the provisions of the Charter of 1932, especially Section 130 thereof.

Petitioner respectfully submits that for the foregoing reasons and questions involved herein this petition for a writ of certiorari should be granted.

Dated, San Francisco, California,
March 2, 1956.

Respectfully submitted,

DION R. HOLM,
City Attorney of the City and County of San Francisco,
THOMAS M. O'CONNOR,
Public Utilities Counsel of the City and County of San Francisco,
FRANK J. NEEDLES,
Deputy City Attorney of the City and County of San Francisco,
Attorneys for Petitioners.

(Appendix Follows.)

Appendix

EXHIBIT "A"

United States Court of Appeals
for the Ninth Circuit

Trans World Airlines, Inc., a corporation, Appellant, vs. City and County of San Francisco, a municipal corporation, Phillip S. Landis, Sam McKee, Victor S. Swanson, Edward B. Baron and Donald A. Cameron, as members of the Public Utilities Commission of the City and County of San Francisco, G. M. Dixon, as Manager and Chief Engineer of the San Francisco Airport, and J. M. Turner, Manager of Utilities for the Public Utilities Commission of the City and County of San Francisco, Appellees.	No. 14,523 Dec. 19, 1955

Appeal from the United States District Court for the Northern District of California, Southern Division.

Before: Stephens, Orr and Pope, Circuit Judges.

Orr, Circuit Judge:

We have for determination the interesting question of whether or not the City and County of San Fran-

cisco, having contracted through its duly authorized officials to permit Trans World Airlines, Inc., to use "common use facilities" at the San Francisco International Airport, situate in San Mateo County, at fixed rates for a term of years, may thereafter, through its duly constituted Public Service Commission, change the contract rates.

In 1942 the City and County of San Francisco, hereafter City, entered into a formal agreement, executed and to be performed in the state of California, with Trans World Airlines, Inc., hereafter T.W.A., one of twelve scheduled airlines currently using the airport. The lease was for a twenty-year term, at charges fixed by the agreement. The property leased consisted of a hangar and certain space in the administration building and, in addition, certain "common use" facilities. Common use facilities are those areas and facilities used in common by the several airlines. Included in this category are landing fields, runways, aprons, taxi-ways, sewerage, water facilities, various lights and signals, control tower service and other conveniences supplied by the airport.

On November 20, 1950, after notice and hearing, the Public Utilities Commission of the City and County of San Francisco promulgated Resolution No. 11,182, thereafter duly approved by the Board of Supervisors of the City and County of San Francisco,[1] purporting to establish prescribed rates and charges for the use of the facilities of the airport. The resolution fixed the charges for the common use

[1]Resolution No. 10,628, December 18, 1950.

facilities at a figure higher than that set in the 1942 contract.

In January 1951 the City notified T.W.A. that T.W.A. would be expected to make payment for future use of the common use facilities at the rates fixed by the Commission's schedule. It gave notice that should T.W.A. fail to make such payments the City would deny to T.W.A. the right to refuel its planes at the airport. Thereupon T.W.A. sought an injunction against this threatened action and prayed for a declaratory judgment to the effect that its contract rates are binding on the City. The City defended on the ground that the 1942 contract was superseded by the Commission's resolution. The City withdrew its threat to deny refueling privileges and no hearing was held on the injunction issue. The District Court sustained the City's theory and entered judgment accordingly.

T.W.A. maintains that the City was granted express statutory authority to enter into the subject contract by section 4 of the Municipal and County Airport Law (Cal. Stats. 1927, p. 458) which was in force in 1942.[2] Section 4 provided, in part, as follows:

"In connection with the erection or maintenance of any such airport or airports, or air navigation facilities, any such city and county . . . or any municipal corporation, shall have the power and jurisdiction . . . to lease or assign for operation such space or area, appurtenances, appliances or other conveniences nec-

[2]The provision was repealed in 1949 but similar provisions were included in Government Code sections 50470-50478.

essary or useful in connection therewith . . . to enter into contracts or otherwise cooperate with the federal government or other public or private agencies, and otherwise exercise such powers as may be required or convenient in the promotion of aeronautics and the furtherance of commerce and navigation by air."

This statute grants plenary authority to lease and contract. The use of the term "any such city and county" is a direct reference to San Francisco, which is the only combined city and county in the state.

It is not contended that in the execution of the contract the parties failed to observe any formalities necessary to the exercise of the powers conferred by the statute. The City takes the position, however, that the statute purports to regulate a "municipal affair" and thereby violates certain prohibitions of the state constitution.

Article XI, section 6 of the California constitution provides, in part, as follows:

". . . Cities and towns hereafter organized under charters framed and adopted by authority of this Constitution are hereby empowered, and cities and towns heretofore organized by authority of this Constitution may amend their charters in the manner authorized by this Constitution so as to become likewise empowered hereunder, to make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in their several charters, and in respect to other matters they shall be subject to and controlled by general laws. . . ."

Article XI, section 8(j) provides in part:

"Municipal Affairs.

"It shall be competent in any charter framed under the authority of this section to provide that the municipality governed thereunder may make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general laws."

T.W.A. recognizes that the effect of Article XI is to preclude regulation by the state legislature of "municipal affairs"[3] but it contends that the operation involved in this suit is not included within the meaning of that term as used in Article XI.

The phrase "municipal affair" is a term of art. Its meaning as used in the constitution must be sought in the decisions of the California courts. The latter courts have repeatedly declared that a matter is not a "municipal affair" unless it is of strictly local interest. Any doubt is to be resolved in favor of state regulatory power. Thus, in Los Angeles Ry. Corp. v. Los Angeles, 16 Cal.2d 779, 783, 108 P.2d 430, the Court said:

". . . But the question here is disposed of by our conclusion that the facts disclose that the one-man or two-man operation of cars over the plaintiff's railway system is not a matter exclusively of municipal con-

[3]T.W.A. argues in the alternative that authority to enter into the subject contract is contained in the San Francisco Charter. We inquire first as to the applicability of the statutory authorization for the reason that the existence of such authorization is material to other questions presented by this case.

cern and is, therefore, not a municipal affair within the meaning of said sections of the Constitution; and that the question of such operation does not relate merely to the power to make and enforce local, police sanitary or other regulations covering the plaintiff which it may be assumed has vested in the City of Los Angeles, pursuant to the provisions of said section 23; or, if it may be said to be a police regulation, that it relates to a matter which is not strictly a local affair and, therefore, has not been included in the reserved power."

To the same effect, see City of Los Angeles v. Post War, etc., Bd., 26 Cal.2d 101, 156 P.2d 746; Bay Cities Transit Co. v. Los Angeles, 16 Cal.2d 772, 108 P.2d 435; Civic Center Assn. v. Railroad Comm., 175 Cal. 441, 166 Pac. 351; and Pac. Tel. & Tel. Co. v. City of Los Angeles, 44 Cal.2d 272, 282 P.2d 36. See also, McQuillin, Municipal Corporations, 3rd Ed., §4.85. The facts of the instant case place it much farther outside the orbit of a "municipal affair" than do those of any of the cases, supra.

The airport is not a strictly local affair. It is part of a global system of air transportation. Its value stems from the fact that it links the San Francisco area with other areas served by airports. It directly serves not only the City of San Francisco but all neighboring and outlying communities. The airport is used by military aircraft. Federal and state authorities regulate charges for common carrier air traffic.[4]

[4]See 49 U.S.C.A. §642; also, People v. Western Airlines, Inc., 42 Cal. 2d 621, 268 P.2d 723.

The City relies on the cases of Krenwinkle v. City of Los Angeles, 4 Cal.2d 611, 51 P.2d 1098, and Ebrite v. Crawford, 215 Cal. 724, 12 P.2d 937, in support of its contention that the airport is a "municipal affair." These cases, however, hold only that the maintenance and operation of a municipal airport is an activity in which a city may properly engage. In each case the Court cited the municipal and county airport law, supra, to show that the state had expressly authorized this activity. If the Supreme Court of California had viewed the operation of municipal airports as a "municipal activity" in the technical sense of those words, a matter thereby excluded from state regulation, it could not have regarded the municipal and county airport law as a source of authority to conduct such airports. These cases support the view that the conduct of municipal airports is a matter subject to state law.

The authorities from other jurisdictions cited by the City are distinguishable.[5] They deal with the question of whether or not a city has sufficient interest in the construction and operation of an airport to justify the expenditure of municipal funds, the use of the tax power, the use of public properties or the use of condemnation proceedings. As the Supreme Court of California observed in the recent case of Pacific Telephone and Telegraph Co. v. City of Los

[5]City of Wichita v. Clapp, 125 Kan. 100, 263 Pac. 12;
Dysart v. St. Louis, 32 Mo. 514, 11 S.W.2d 1045;
City of Ardmore v. Excise Board, 155 Okla. 126, 8 P.2d 2;
State v. Clausen, 157 Wash. 457, 289 Pac. 61;
City and County of Denver v. Board of Commissioners, etc., 113 Colo. 150, 156 P.2d 101.

Angeles, supra, p. 281, the fact that the city could lawfully regulate a business does not make the matter a "municipal affair" in the sense that the general state law is supplanted. We are persuaded that express statutory authorization existed for the execution of the 1942 agreement.

The City has bound itself as to rates and charges for the common use facilities by entering into a valid contract expressly authorized by state law. Even so, argues the City, the rate schedule of the contract was superseded by subsequent regulation by the Public Utilities Commission. In discussing this contention we assume arguendo that the Public Utilities Commission's regulatory jurisdiction extends to the airport.[6]

The City had authority under this assumption to proceed by contract or by regulation. It elected to proceed by contract. The rule of law governing a subsequent attempt by the municipality to vitiate a contract such as that before us through subsequent exercise of its regulatory power is well stated in 43 Am. Jur., §88:

"It has been held in numerous cases, however, that a state legislature unless prohibited by constitutional

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[6]T.W.A. urges that the airport is not a public utility and therefore not subject to regulation by the Commission, that even if it be subject to regulation the Commission has not lawfully exercised its regulatory power in that there has been no finding after hearing that the contract rate was excessive and finally that the terms of the Commission's resolution exempted the subject contract. The resolution provided that the rates prescribed were adopted "except as otherwise provided, or amended by agreement."

provision may authorize a municipal corporation to establish by an inviolable contract the rates to be charged by a public utility for a reasonable term of years, the effect of which is to suspend, during the life of the contract, the governmental power of the state or municipality to fix or regulate the rates." See also, Annot. 74 L.Ed. 234, 236, to the same effect.

Authorities sustaining this rule are Public Service Co. v. St. Cloud, 265 U.S. 352, Vicksburg v. Vicksburg Waterworks Co., 206 U.S. 496, and Femmer v. City of Juneau, 9 Cir. 1938, 97 F.2d 649.[7] In the Vicksburg case the Supreme Court held, p. 508:

"That a state may, in matters of proprietary rights, exclude itself from the right to make regulations of this kind or authorize municipal corporations to do so, when the power is clearly conferred, has been too frequently declared to admit of doubt. Los Angeles v. Los Angeles City Water Co., 177 U.S. 558, Walla Walla v. Walla Walla Water Co., 172 U.S. 1-7, New Orleans Waterworks Co. v. Rivers, 167 U.S. 674, Freeport Water Co. v. Freeport, 180 U.S. 587-593."

In the instant case the statutory authority conferring the power to contract was more express than that found sufficient in the cases above noted.

The City cites a line of cases holding that contracts entered into by a public utility and a private party are subject to superseding subsequent rate making

[7]Cf. Home Telephone Co. v. Los Angeles, 211 U.S. 265.

regulations.[8] The law to that effect is well settled, see Annot. 9 A.L.R. 1423. Such contracts are subject to a condition implied in law that rates and charges may be superseded by utility regulation. Where, however, the municipality enters into a contract pursuant to express statutory authority to contract, the courts have recognized that the specific authority to contract, insofar as this authority conflicts with the general power conferred on the municipality to regulate public utility rates, should prevail.

In Limoneira Co. v. Ry. Comm., 174 Cal. 232, 162 Pac. 1033, the Supreme Court of California recognized the distinction between the two lines of authority, stating, p. 238:

"The uniform course of decision of the United States Supreme Court on questions similar in principle precludes any claim that the exercise by the state of the power to thus affect such an existing contract as that here involved impairs the obligation of contract within the meaning of the federal constitution. We are speaking, of course, of a situation where the state cannot be held as a matter of fact

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[8]Pinney and Boyle Co. v. Los Angeles Gas, etc. Corp., 168 Cal. 2d 12, 141 Pac. 620;
Law v. Railroad Comm., 184 Cal. 737, 195 Pac. 423;
Market St. Ry. Co. v. Pac. Gas & Elec. Co., D.C.N.D. Cal. 1925, 6 F.2d 633, appeal dismissed 271 U.S. 691;
Sutter Butte Canal Co. v. Railroad Comm., 202 Cal. 179, 259 P. 937, aff'd 279 U.S. 125;
Midland Realty Co. v. Kansas City Power and Light Co., 300 U.S. 109, rehearing denied 300 U.S. 687;
Union Drygoods Co. v. Georgia Public Service Corp., 248 U.S. 372.

to have surrendered to the public utility involved, by something tantamount to a contract between it and the public utility, any portion of the regulatory power. . . ."

The trial court attempted to distinguish the St. Cloud and Vicksburg cases, supra, on the theory that these decisions apply only to charges applicable "not to any one customer, but to all members of the public served," whereas in the present case the contract is between a municipality and a single customer. We think, however, that the instant case falls within the principle stated in the St. Cloud and Vicksburg decisions. If the municipality may be deemed as in the St. Cloud and Vicksburg cases to have surrendered its regulatory power as to the entire public, certainly it has the lesser power to suspend its rate-making authority as to a single customer. In Femmer v. City of Juneau, supra, this court decided that a municipality could so do. We conclude that insofar as the resolution of the Public Utilities Commission purported to abrogate the rates and charges fixed by the 1942 contract the resolution was void.

The City further contends that the rates and charges pertinent to the common use facilities are governed by the provisions of the contract wherein T.W.A. is authorized to use the said facilities "on the same terms and conditions as apply to others." This provision is followed, however, by a lengthy designation of fees which purports to set up an elaborate rate schedule. There can be no doubt on a reading of the agreement that the latter was intended

to fix the rates and charges for the common use facilities.

Reversed.

(Endorsed:) Opinion. Filed Dec. 19, 1955.

Paul P. O'Brien, Clerk.

EXHIBIT "B"

United States Court of Appeals for the Ninth Circuit

Trans World Airlines, Inc., a corporation, Appellant, vs. City and County of San Francisco, a municipal corporation, Philip S. Landis, Sam McKee, Victor S. Swanson, Edward B. Baron and Donald A. Cameron, as members of the Public Utilities Commission of the City and County of San Francisco, G. M. Dixon, as Manager and Chief Engineer of the San Francisco Airport, and J. M. Turner, Manager of Utilities for the Public Utilities Commission of the City and County of San Francisco, Appellees.	No. 14,523

JUDGMENT

Appeal from the United States District Court for the Northern District of California, Southern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, and was duly submitted.

On consideration whereof, It is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is reversed, with costs in favor of the Appellant, and against the Appellees.

It is Further Ordered and adjudged by this Court, that the Appellant recover against the Appellees for its costs herein expended and have execution therefor.

(Endorsed) Judgment filed and Entered: December 19, 1955, Paul P. O'Brien, Clerk.

EXHIBIT "C"

In the United States District Court
For the Northern District of California,
Southern Division

Civil No. 30,326

Trans World Airlines, Inc., formerly known as Transcontinental & Western Air, Inc., a Delaware corporation,
Plaintiff and Cross-Defendant,

vs.

City and County of San Francisco, a California municipal corporation, et al.,
Defendants and Cross-Complainants.

ROCHE, District Judge: Plaintiff is a corporation which in the course of its business utilizes land and facilities so that its airplanes may land, take off, and be serviced and stored.

Defendant, represented by its Public Utilities Commission, business operator of the San Francisco Airport, in 1942 entered into a 20 year lease agreement with the plaintiff to furnish the land and facilities so used.

Twice during the life of this lease between the parties litigant, the Public Utilities Commission of the City regulated and prescribed rates which plain-

tiff and the other airlines were to pay for using the airport.

The rates prescribed by the Public Utilities Commission were higher than the rates fixed by the lease of plaintiff and defendant. Plaintiff refused, and still refuses to pay these higher rates, insisting that the limits of its liability are the charges fixed by the lease. Defendant has advised plaintiff that it must pay under the schedule of rates and charges, and that in default of such payments the airline will be deprived of certain facilities at the airport. This action for declaratory relief followed.

The City contends that the rates in the schedules are enforceable only as they apply to landings, take-offs, and other common use facilities; as to those properties not used in common it is admitted that the lease controls. The questions advanced may be summarized as follows:

(1) Does the furnishing of common use facilities at the airport to the airlines constitute a public utility service?

(2) Does the Public Utilities Commission of the City have rate-making jurisdiction over the airport?

(3) Does the law allow a public utility to depart from the regular schedule of rates and charges by contract?

(4) Does the doctrine of commercial frustration apply to the facts of this case?

1. Public Utility Function.

In the total design of the airport "common use facilities" are installed which are available in the operation of all aircraft. These are the runways, where planes land and take off; the landing aprons or ramps where passengers and cargo are taken on and discharged; the taxi-ways which connect the runways with the loading aprons or ramps; and other conveniences and facilities such as lights, signals, beacons, control tower, etc., shared by all airline companies utilizing the airport. The defendant maintains that the utilization of the enumerated areas and facilities involves the provision of a public utility service to the airlines as customers of this service.

Plaintiff counters with the proposition that the public to be served by the airport is the general public which uses it; that these people, and not the airlines, are the true customers of the airport's facilities. To support its argument plaintiff points out that 3,250,000 members of the general public used the airport last year, but that only 12 airlines are parties to the contracts entered into for facilities. However, the fact that only relatively few airlines use the service does not control the question. The number using the service may be few in number. *Camp Rincon Resort Co. v. Eshleman* (1916) 172 Cal. 561, 158 Pac. 186. Indeed, the fact that only one customer uses the services rendered does not control the question. *Ford Hydro-Electric Co. v. Town of Aurora* (1932) 240 N. W. 418, 206 Wis. 316.

What does control then? The factor which as far as the public is concerned which determines whether an agency is a public utility, is whether all persons, many or few, corporate or individual, who from the nature of the service rendered are in a position to require it, have a right to be supplied the service on equal terms. *Allen v. R. R. Commission* (1918) 179 Cal. 68, 175 Pac. 466. The limitations of place, requirements, ability to pay and other facts determine the customers that will use a particular service. *Terminal Taxicab Co. v. Kuntz* (1916) 241 U. S. 252, 60 L. Ed. 984.

Plaintiff cites the cases of *Marin Water Co. v. Town of Sausalito* (1914) 168 Cal. 587, 143 Pac. 767, and *Del Mar Water Co. v. Eshleman* (1914) 167 Cal. 666, 140 Pac. 591, as instances where the court found that the contracting parties were not in a relationship of public utility and customer. In the Marin Water case a water company contracted to supply a municipality with a bulk supply of water for 10 years. The municipality in turn sold the water to its inhabitants. The question raised was whether the water company was functioning as a public utility in supplying the City with water under this contract. This case is inapplicable as it involves a sale in bulk of a commodity from one utility to another. In the instant case there is a continuing service rendered by one utility to another, this latter utility being a member of the general public served.

The Del Mar case is also distinguishable. The court found in this case that the utility had not offered

its water to the general public. The sale of water to the 17 inhabitants of the town of Del Mar was on a per barrel basis. It was like the private sale of water by a farmer having a well in his backyard. This case is limited to cases presenting similar facts.

The public function of a municipal airport is recognized in many cases, *State ex rel. City of Lincoln v. Johnson* (1928) 117 Neb. 301, 220 N. W. 273; *State v. Jackson* (1929) 121 Ohio St. 186, 167 N. E. 396; *Price v. Storms, et al., Board of Trustees, Town of Okewah* (1942) 191 Okla. 410, 130 Pac. (2d) 523; *Jones v. Keck* (1946) 74 Ohio App. 549, 74 N. E. (2d) 644; *City of Toledo v. Jenkins* (1944) 143 Ohio St. 141, 54 N. E. (2d) 656; *State v. Board of County Commissioners* (1947) 149 Ohio St. 583, 79 N. E. (2d) 698. In the case of *Toledo v. Jenkins,* cited supra, the court stated, "The statutory provisions confer upon the municipal corporation power to own or lease and operate landing fields and improve them with runways, buildings or other structures, so as to make them fully equipped aircraft and transportation terminals. As an airport of that character is a public utility (*State ex rel. Chandler v. Jackson,* 121 Ohio St. 186, 167 N. E. 396), the Toledo Municipal Airport was and is a complete public utility."

The San Francisco Airport has been built with public funds for the public use. It is the determination of this court that this use is twofold. On one hand for the use of the air-traveling public, and on the other, for the use of those individuals and corporations using the airport for their aircraft. Certainly

this latter group is more restricted than the former, but this fact does not mitigate against the public utility function of the City as regards the common use facilities. These facilities are offered to the airline companies as customers of the airport; they are offered as a public utility service.

2. Rate-Fixing Power of the San Francisco Public Utilities Commission Over the San Francisco cisco Airport.

Section 121 of the charter of the City and County of San Francisco gives the Public Utilities Commission jurisdiction over the airport, and provides in part:

"The public utilities commission shall have charge of the construction, management, supervision, maintenance, extension, operation and control of all public utilities and other properties used, owned, acquired, leased or constructed by the city and county, including airports, for the purposes of supplying any public utility service to the city and county and its inhabitants, to territory outside the limits of the city and county, and to the inhabitants thereof."

The rate-fixing power of the Public Utilities Commission is found in Section 130 of the charter, which provides in part:

"The commission shall have the power to fix, change and adjust rates, charges or fares for the furnishing of service by any utility under its jurisdiction, and to collect by appropriate means all amounts due for said service, and to discontinue service to

delinquent consumers and to settle and adjust claims arising out of the operation of any said utilities.

Rates may be fixed at varying scales for different classes of service or consumers. The commission may provide for the rendition of utility service outside the limits of the city and county and the rates to be charged therefor which may include proportionate compensation for interest during the construction of the utility rendering such service."

No confusion should arise by reason of the coincidence that the rate-fixing body in this case happens to be the Public Utilities Commission, also having jurisdiction over the utility itself. In entering the lease the Public Utilities Commission was acting proprietarily. In the exercise of its rate-fixing power the commission is acting as a public rate-fixing body even though it is engaged in a function as operator of the utilities. *Connett v. City of Jerseyville,* 110 Fed. (2d) 1013. In California a municipality has the power to fix rates and charges of municipally owned utilities. *Durant v. City of Beverly Hills* (1940) 39 Cal. App. (2d) 133, 102 Pac. (2d) 739; *Jochimsen v. City of Los Angeles* (1921) 54 Cal. App. 715, 202 Pac. 902; *Bowles v. City and County of San Francisco* (1946) 64 Fed. Supp. 609; *City of Pasadena v. Railroad Commission* (1920) 183 Cal. 526, 192 Pac. 25. The approved charter of a municipality is a law of the state and has the same force and effect as a law enacted by the legislature. *Yosemite, etc. v. State Board of Equalization* (1943) 59 Cal. App. (2d) 39. Under Section 130 of the charter the Public Utilities

Commission is empowered to establish rates and charges for the furnishing of utility services outside the limits of the city and the rates to be charged therefor. In order for the services of an airport to be rendered outside the limits of a municipality it necessarily follows that the airport be constructed outside the boundaries of the municipality.

Plaintiff contends that the police power of the city, including its rate-fixing power ceases at its borders, and that only a proprietary power may be exercised beyond its borders. *South Pasadena v. Terminal Ry. Co.* (1895) 109 Cal. 319, 41 Pac. 1093; *Incorporated Town of Sibley v. Ocheydan Electric Co.* (1922) 194 Iowa 950, 187 N. W. 560; *City of Colorado Springs v. Colorado City* (1908) 42 Colo. 75, 94 Pac. 316. This is true except in those cases where the legislature has provided for the exercise of this power. The charter of the city, approved by the legislature, specifically provides for the exercise of this power, and therefore the Public Utilities Commission has jurisdiction to set the rates and charges for the common use facilities at the airport.

3. Departure From the Prescribed Rates by Contract.

It is this court's decision that in affording the common use facilities at the airport to the airlines that the City is engaged in a public utility function. Plaintiff contends that, notwithstanding this fact, the City can by lease agreement fix with each individual air-

line using the airport the charges for these facilities and services for a definite term.

Plaintiff cites two Supreme Court cases, *Home Telephone Co. v. Los Angeles* (1908) 211 U. S. 265, and *Public Service Co. v. St. Cloud* (1924) 265 U. S. 352, as instances where a public utility was held to have entered into a binding contract for the furnishing of a utility service at a fixed charge. Both cases are distinguishable from the instant case.

The charges fixed by contract in both of these cases were applicable not to any one consumer alone, but to all members of the public served. In other words, any member of the public utilizing the public utility service offered had a right to be served at the same price paid by those similarly situated. In the instant case the lease agreement constitutes nothing more than a contract between *one* consumer, and a public utility, not for the purpose of establishing a uniform rate to be charged all members of the public using the utility, but rather to establish a preferential position for this one consumer for twenty years. A contract of this type is entirely valid when executed, and is binding in the absence of rate regulation by the Public Utilities Commission acting on behalf of the public. Any intention on the part of the parties to fix charges not subject to regulation is inoperative as a matter of law. The decisions next mentioned fully support the conclusion that, with reference to the common use facilities, the general schedule applicable to all must as a matter of law, be applied to this contract.

The case of *Pinney & Boyle Co. v. Los Angeles Gas Co.* (1914) 168 Cal. 12, 141 Pac. 620, decided by the Supreme Court of this state is in point. This was a suit to enforce the terms of a contract entered into between plaintiff and defendant whereby the plaintiff agreed to take for operation of its machinery, and defendant to supply electricity for that purpose. Defendant was engaged as a public utility in the supply of electricity to the inhabitants of the City of Los Angeles. While this private contract between the parties was in existence, the City of Los Angeles, through its legislative body, regulated and prescribed the rates which the defendant public service corporation was permitted to charge consumers. Apparently, at the time of the contract, the rate-fixing power had not been exercised by the municipality.

The court held that the fixation of the rate thus adopted controlled over the terms of the contract. The court ruled that a contract of such nature must necessarily yield to a subsequent exercise of the rate-fixing power. This was on the ground that the parties are deemed to have contracted with that result in view. A holding, identical to that made in the case which has preceded appears in *Law v. Railroad Commission* (1921) 184 Cal. 737, 195 Pac. 423.

Various other decisions of the Supreme Court of California are in accord. *Leavitt v. Lassen Irrigation Co.* (1909) 157 Cal. 82, 106 Pac. 404; *Limoneira Co. v. Railroad Commission* (1917) 174 Cal. 232, 162 Pac. 1033.

Decisions of the Supreme Court of the United States are in accord. *Midland Realty Co. v. Kansas City Power and Light Co.*, 300 U.S. 109, 81 L. Ed. 540, 57 S. Ct. 345; *Union Drygoods Co. v. Georgia Public Service Corp.*, 248 U. S. 372, 63 L. Ed. 309, 37 S. Ct. 117, 9 A.L.R. 1420. See also, Annotation 74 L. Ed. 234 reviewing both the California and Federal cases on this subject.

Plaintiff contends that it would be unfair for this court to declare the lease inoperative, and to hold it subject to the prescribed rates and regulations of the Public Utilities Commission. The reason put forth is that plaintiff would not have entered into a lease of hangar space without having fixed with the City in advance the charges as to the common use facilities. This argument is without merit. If it were not a manufacturer might well argue that he would not have leased a factory for 20 years except for the fact that he was able to fix by contract the price of his electricity and water for the same period. Clearly if a contract had been entered into for these utility services at a fixed rate, subsequent regulation by the proper body, would affect the charges agreed upon.

The fact that the City is both the lessor of hangar space and the provider of the common use facilities does not change the holding in this case. The hangars are constructed and leased so that the customers of the City at the airport (the airlines) can better avail themselves of the common facilities offered. This in no way affects the holding that the airport, as far as

the common use facilities are concerned, is offering a public utility service, the rates for which can be set by the Public Utilities Commission of San Francisco.

4. Commercial Frustration as a Defense.

The City as a distinct and separate defense contends that the "doctrine of commercial frustration" should apply in this case, thus enabling the City to avoid the lease agreement with plaintiff.

It is evident from the testimony and documentary evidence presented in this case that this defense is without merit.

In accordance with the foregoing it is Ordered

1. That Trans World Airlines, Inc., account to the defendants and cross-complainants in this action as to the extent of its operations to and from San Francisco Airport from and after December 31, 1950.

2. That judgment be entered herein in favor of defendants, on findings of fact and conclusions of law, and that the injunction pendente lite be denied.

3. That judgment in favor of cross-complainants be entered herein in an amount to be determined. Counsel is directed to prepare findings of fact and conclusions of law in conformance with the opinion. Each party to pay its own costs.

FILED
APR 10 1956
HAROLD B. WILLEY, Clerk

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1955

No. 765

CITY AND COUNTY OF SAN FRANCISCO,
a municipal corporation, et al.,
Petitioners,

vs.

TRANS WORLD AIRLINES, INC.,
a corporation,
Respondent.

BRIEF OF RESPONDENT, TRANS WORLD AIRLINES, INC., IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

LOYD WRIGHT,
1125 - 111 West Seventh Street,
Los Angeles 14, California,
EUGENE M. PRINCE,
FRANCIS R. KIRKHAM,
NOEL DYER,
Standard Oil Building,
San Francisco 4, California,
Attorneys for Respondent.

PERRAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

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In the Supreme Court
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CITY AND COUNTY OF SAN FRANCISCO,
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Petitioners,

vs.

TRANS WORLD AIRLINES, INC.,
a corporation,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION.

I.

OPINIONS BELOW.

The opinion of the Court of Appeals (R. 727) is reported at 228 F.2d 473. The opinion of the District Court (R. 167) is reported at 119 F.Supp. 516. Each is reprinted in the appendix to the petition for a writ of certiorari.

II.

STATUTES INVOLVED.

The pertinent parts of the statutes involved are printed in the appendix to this brief.

III.

PRELIMINARY STATEMENT.

Petitioner, the City and County of San Francisco, as operator of the San Francisco International Airport, made a contract granting the respondent airline the right to use the facilities of the airport and providing the charges for such use (R. 16, 20-21). This contract was made in 1942 for a 20-year term (R. 14, 16). Thereafter in 1951 the City claimed that the contract charges (R. 20-21) were superseded by its own unilateral action under an alleged power of public utility rate making (R. 55) as to the runways, navigation aids, passenger and baggage areas, and other facilities used by other airlines as well as by TWA ("common use facilities"). Respondent sued for declaratory relief. The Court of Appeals, reversing the judgment of the District Court (R. 167) held the contract valid (R. 727).

The petition for certiorari is inaccurate, both in its statement of the case and of the questions involved. As will appear, there is no conflict of decision between circuits, nor any conflict between the decision of the Court of Appeals and California law. Contrary to assertions of the petition, the case involves no question of public importance. The only federal question discussed in the

petition (p. 7) is unsubstantial on the face of the statutes cited. It was raised for the first time by the City's petition for rehearing in the Court of Appeals, a petition which that court denied without opinion.

The case involves no question concerning legislative power. What Congress or the California Legislature might constitutionally do in regulating charges by airports to airlines for the use of airport facilities is not before the Court. No such regulation has been undertaken by federal authority, and the state statute expressly authorizes the present contract.

The Civil Aeronautics Act, first referred to in the City's petition for rehearing in the Court of Appeals, gives the Civil Aeronautics Board the power *to regulate air carriers and the rates of air carriers* (June 23, 1938, secs. 404, 1002, 52 Stat. 993, 1018; 49 U.S.C. 484, 642(d); Appendix, this brief, p. v.) It does not provide for regulating airports or the charges of airports, or for any filing by airports of tariffs or rate schedules.

The Federal Airport Act (May 13, 1946, 60 Stat. 170, 49 U.S.C. 1101), one section of which (49 U.S.C. 1110) is cited in the petition for certiorari (pp. 13, 30), is not a statute regulating airports, but authorizes Federal monetary and other aid for airport development and construction. It was not mentioned below until the petition for rehearing.

The case turns solely upon questions of California law. The state statute gives municipalities, in the words of the Court of Appeals, *"plenary authority to lease and contract"* concerning the use of the facilities of municipal

airports and the charges therefor (Appendix, Petition for Certiorari, p. iv).[1] The City has never disputed that the statute grants contracting authority. The City's point is that the statute does not apply to cities with freeholders' charters—though the statute says it does[2]—because operation of the airport is a "municipal affair" (see Petition for Certiorari, pp. 19 et seq.).

As pointed out by the Court of Appeals in overruling the City's contention, the term "municipal affair" is a technical one, governed by California law. Under section 8(j) of Article XI of the California Constitution (Appendix, this brief, p. i), the term marks a line between matters subject exclusively to municipal control and those governed by general state laws. A city with a freeholders' charter is bound by general state law except as to "municipal affairs"; i.e., under the California cases construing the state Constitution, *matters of strictly local interest.* The operation of an international airport is not a matter of strictly local interest and is subject, therefore, to the general laws of the state. As the Court of Appeals said (Appendix, Petition for Certiorari, p. v):

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[1]California Municipal and County Airport Law (Cal.Stats. 1927, c. 267, sec. 4, pp. 485, 487, Appendix, this brief, pp. ii-iii). See quotation by Court of Appeals (Appendix, Petition for Certiorari, pp. iii-iv).

[2]The statute grants power to municipalities generally, but it also makes specific reference to cities "operating under a freeholders' charter" and also to "*any city and county,*" which means to San Francisco, the only city and county in the state. The statute makes general reference to airport facilities, but it also mentions "all places for flying take-off and landing of aircraft • • • signal lights, radio equipment • • • and other *air navigation* facilities"—in the idiom of the case at bar, "common use facilities." See Appendix, this brief, p. ii.

"The phrase 'municipal affair' is a term of art. Its meaning as used in the constitution must be sought in the decisions of the California courts. The latter courts have repeatedly declared that a matter is not a 'municipal affair' unless it is of strictly local interest. Any doubt is to be resolved in favor of state regulatory power. [Citing California decisions[3]].

* * * * *

The facts of the instant case place it much farther outside the orbit of a 'municipal affair' than do those of any of the cases, supra.

The airport is not a strictly local affair. It is a part of a global system of air transportation."

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[3]Among the decisions cited are: *Pacific Tel. & Tel. Co. v. City of Los Angeles* (1955) 44 Cal.2d 272, 282 P.2d 36, holding that the right to conduct a telephone business in Los Angeles is not a municipal affair; *Los Angeles Ry. Corp. v. Los Angeles* (1940) 16 Cal.2d 779, 783-785, 108 P.2d 430, holding that the city has no right to require two-men crews on car lines serving both the city and the outlying areas; *Bay Cities Transit Co. v. Los Angeles* (1940) 16 Cal.2d 772, 777, 108 P.2d 435, holding that the city has no right to divert busses from the Venice freeway; *Civic Center Assn. v. Railroad Comm.* (1917) 175 Cal. 441, 450-451, 166 Pac. 351, holding that the state commission has the right, and the city no right, to compel railroads to establish a union depot in Los Angeles.

See also *Pacific Tel. & Tel. Co. v. City of Los Angeles* (1955) 44 Cal.2d 272, 282 P.2d 36; *Ex Parte Daniels* (1920) 183 Cal. 636, 192 Pac. 442, holding that "if there is a doubt as to whether or not such regulation is a municipal affair, that doubt must be resolved in favor of the legislative authority of the state" (183 Cal. 639).

If the operation of the airport were a "municipal affair"—which it is not—the City would still have had *charter* authority to make the contract in suit because a freeholders' charter gives the city all powers over municipal affairs which are not expressly withheld (*West Coast Adver. Co. v. San Francisco* (1939) 14 Cal. 2d 516, 95 P.2d 138). Contracting authority is also implicit in the City's statutory and charter power to manage the airport (see Appendix, this brief, pp. iii, iv; *Femmer v. City of Juneau* (9 Cir. 1938) 97 F.2d 649, 652).

The existence of express statutory authority for the contract in suit makes applicable a legal principle "too frequently declared to admit of doubt,"[4] which is completely decisive of the case. Where a municipal corporation has statutory authority to deal with a given situation *either* by contract *or* as a matter of utility rate regulation, then if it elects to proceed by contract it is bound by the contract for the full term, and cannot unilaterally alter the contract under regulatory powers. The Court of Appeals held that the present case, involving a contract for a nonexclusive use by a public service corporation of a municipally owned facility, is typically within this rule. The court cited many supporting authorities, including decisions of this Court (Appendix, Petition for Certiorari, pp. viii-ix).[5]

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[4] *Vicksburg v. Vicksburg Waterworks Co.* (1907) 206 U.S. 496, 508, quoted by the Court of Appeals (Appendix, Petition for Certiorari, p. ix).

[5] The Court of Appeals said (Appendix, Petition for Certiorari, pp. viii-ix):

> "The City has bound itself as to rates and charges for the common use facilities by entering into a valid contract expressly authorized by state law. Even so, argues the City, the rate schedule of the contract was superseded by subsequent regulation by the Public Utilities Commission. In discussing this contention we assume arguendo that the Public Utilities Commission's regulatory jurisdiction extends to the airport.
>
> The City had authority under this assumption to proceed by contract or by regulation. It elected to proceed by contract. The rule of law governing a subsequent attempt by the municipality to vitiate a contract such as that before us through subsequent exercise of its regulatory power is well stated in 43 Am.Jur., §88:
>
> 'It has been held in numerous cases, however, that a state legislature unless prohibited by constitutional provision may authorize a municipal corporation to establish by an inviolable contract the rates to be charged by a public utility for a reasonable term of years, the effect of which is to suspend,

Since the rule applies where a municipality has *coexisting* contracting and regulatory authority, and elects, as did the City here, to proceed by contract, it follows that the contract in suit is valid whether or not the airport or some segment of it is a public utility. It is valid regardless of whether the City has, or had in 1942, regulatory power over charges to the airlines for the use of airport facilities. Such questions are simply immaterial in the case at bar. The Court of Appeals assumed "arguendo" that the City has regulatory power over the airport (Appendix, Petition for Certiorari, p. viii).

Since the belatedly raised federal question is unsubstantial, and since the California statute expressly authorized the City to make this contract, the principle applied by the Court of Appeals requires the decision

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during the life of the contract, the governmental power of the state or municipality to fix or regulate the rates.' See also, Annot. 74 L.Ed. 234, 236, to the same effect.

Authorities sustaining this rule are Public Service Co. v. St. Cloud, 265 U.S. 352, Vicksburg v. Vicksburg Waterworks Co., 206 U.S. 496, and Femmer v. City of Juneau, 9 Cir. 1938, 97 F.2d 649. In the Vicksburg case the Supreme Court held, p. 508:

'That a state may, in matters of proprietary rights, exclude itself from the right to make regulations of this kind or authorize municipal corporations to do so, when the power is clearly conferred, has been too frequently declared to admit of doubt. Los Angeles v. Los Angeles City Water Co., 177 U.S. 558, Walla Walla v. Walla Walla Water Co., 172 U.S. 1-7, New Orleans Waterworks Co. v. Rivers, 167 U.S. 674, Freeport Water Co. v. Freeport, 180 U.S. 587-593.'

In the instant case the statutory authority conferring the power to contract was more express than that found sufficient in the cases above noted."

California municipalities operate municipal airports in their proprietary capacity (*Pignet v. City of Santa Monica* (1938) 29 Cal.App.2d 286, 287, 84 P.2d 166; *Coleman v. City of Oakland* (1930) 110 Cal.App. 715, 719-720, 295 Pac. 59; *Marin Water etc. Co. v. Town of Sausalito* (1914) 168 Cal. 587, 594-595, 143 Pac. 767).

which that court made and would, we submit, permit no other. We will, nevertheless, comment on each point made by the petition, starting with its statement of the case, which is inadequate to the point of misleading.

IV.

CORRECTION OF PETITIONERS' STATEMENT OF THE CASE (Petition, pp. 3-7).

The instrument by which the City claims that the 1942 contract was superseded as to charges for the common use facilities is a "schedule" of the municipal Public Utilities Commission effective January 1, 1951 (R. 55). Actually this schedule does not purport to affect the contract; its opening paragraph, to which no reference is made in the petition for certiorari, is as follows (R. 55):

> "Section 1. General Provisions: *Except as otherwise provided, or amended by agreement,* the Public Utilities Commission hereby adopts the following rates and charges for the use of the facilities and services of the San Francisco Airport."[6]

The petition for certiorari creates throughout the misimpression that the municipal Public Utilities Commission is a purely regulatory body. Actually it has broad powers of *management* over the airport (Charter, sec. 121, quoted Appendix, this brief, p. iv); it is a managerial as well

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[6]Even apart from the express exception in the schedule, the City could not affect the contract merely by its own unilateral action in filing a new "schedule of rates." See *Federal Power Commission v. Sierra Pacific Power Company* (Feb. 27, 1956) 24 U.S. Law Week 4094, 4095, and *Wichita R.R. v. Pub. Util. Comm.* (1922) 260 U.S. 48, 58.

as a regulatory body. The Commission and its representative, the airport manager, **negotiated** the present contract (R. 309), and treated it for eight years as a contract. None of the facts in this regard appear from the petition for certiorari. Briefly they are:

When the agreement was made in 1942 the airport had only two scheduled air carriers, TWA and United Airlines (R. 277, 308). The Airport Manager testified that competition with other airports to obtain permanent airline service was a factor inducing the City to make the agreement (R. 315, 317-318).[7]

The Airport Manager, after negotiations with TWA, made a draft of agreement (R. 310); the City Attorney's office worked it into final form (R. 310); it was then approved by the City Attorney, by the Manager of Utilities and by the Director of Properties (R. 36); recommended by the Public Utilities Commission (R. 39), and executed by the Mayor after public advertisement and upon unanimous authorization by the Board of Supervisors (R. 36-41). Three supplementary agreements were

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[7]The following language of this court in *United Gas Pipe Line Company v. Mobile Gas Service Corporation* (Feb. 27, 1956) 24 U.S. Law Week 4090, has some pertinence here (p. 4093):

"Our conclusion that the Natural Gas Act does not empower natural gas companies unilaterally to change their contracts fully promotes the purposes of the Act. By preserving the integrity of contracts, it permits the stability of supply arrangements which all agree is essential to the health of the natural gas industry. Conversion by consumers, particularly industrial users, to the use of natural gas may frequently require substantial investments which the consumer would be unwilling to make without long-term commitments from the distributor, and the distributor can hardly make such commitments if its supply contracts are subject to unilateral change by the natural gas company whenever its interests so dictate."

made in 1946, 1947, and 1948 (R. 41-43, 45-52). None referred to "rate schedules" and all expressly confirmed the original agreement; illustrative is the supplement of June 2, 1948 (R. 54).

In 1946 the Public Utilities Commission made a new "schedule of rates and charges" (City's Exh. B, an original exhibit (R. 721)). Like the later schedule of 1951 it applied "except as otherwise provided, or amended by agreement." The petition for certiorari mentions the 1946 schedule (p. 5) but not the exception therein, nor the fact that although the scheduled charges were higher, the City continued to bill TWA at contract rates (R. 248, 254).

In December 1947, the City made an agreement with United Air Lines of a general nature similar to the agreement with TWA (R. 393), again electing to proceed by contract rather than by its supposed power of rate regulation.

At pages 4-5 the petition quotes part of section 3 of the contract, arguing that, as a matter of contract, the charges therein set forth would vary in accordance with future "schedules" adopted by the Commission. This point simply involves construction of the contract and is not assigned as a reason for granting the writ. The Court of Appeals rejected the argument, holding that the contract phrase "use, in common with others authorized so to do and on the same terms and conditions as apply to others," refers to *use* and not to rates of charge (Appendix, Petition for Certiorari, p. xi). The Court pointed out that the contract sets forth the charges explicitly (R. 20-21); it sets them up as contractual items without reference to any "schedule," existing or future (R. 20-

21); the charges were fixed by negotiation (R. 285, 309); section 13 prohibits charges or fees "Except as otherwise expressly provided for in this lease and agreement" (R. 28).

The petition refers to the large sums spent for airport improvements since the making of the 1942 contract, but does not relate these statements to any legal issue. The contract, obviously contemplating the probability of such improvements, provided for escalation of contract charges in several particulars, including escalation for increase in size of planes (R. 21, 324).

The petition by its insistence that "the airport" is a public utility tends to create the impression that the City regulates the "rates" to be paid by all enterprises using airport facilities, with TWA as a lonely exception. Actually the City claims rate-making power only as to one segment of airport operation, i.e., the use of certain facilities by the airlines and various matters relating to delivery of petroleum products for aircraft use (R. 68-72). It *disclaims* rate-fixing power as to almost all enterprises using the airport, regardless of whether they use its facilities "in common." There is no fixing of "utility rates" to be paid by bus lines or other transportation companies, by public utilities serving the airport, or by parking lots, renters of office and administration space, or by concessions and services of all sorts and kinds (R. 384-390). Regulatory authority is disclaimed as to many facilties used by the airlines; thus the contract in suit is admittedly binding (R. 390) in its provisions concerning hangar space, parking space for aircraft, shop and repair facilities, and office and administrative quarters (R. 15-18).

The above facts show, contrary to the implications of the petition, that even the City's *claims* for regulatory authority at the airport are very limited, and that contractual arrangements under the City's proprietary powers of management are the rule, not the exception, in providing for the use of airport facilities.

V.

ARGUMENT.

A. THERE IS NO MERIT IN THE CITY'S REASONS FOR ALLOWANCE OF THE WRIT

(Answering Petition for Certiorari, pp. 7-8).

1. No conflict with state law.

The alleged conflict relates to the ruling of the Court of Appeals that operation of the airport is *not* a "municipal affair" and consequently *is* subject to the general laws of the state which gave specific authority for the contract in suit.

The City argues this point at pages 19-27 of the petition for certiorari, and the gist of its argument is this sentence (p. 22):

> "If municipally owned water, light, heat and power systems are 'municipal affairs,' it necessarily follows that a municipally owned airport is a 'municipal affair.'"

The cases, including *City of Pasadena v. Railroad Commission* (1928) 183 Cal. 526, 192 Pac. 95, cited in the petition for certiorari (p. 22) to show that a city waterworks is a "municipal affair," were *not decided* under

the municipal affair provisions of the California Constitution (Article XI, secs. 6, 8(j), Appendix, this brief, p. i). They *do not hold* that the operation even of a municipal waterworks is beyond the operation of general state laws. Their point is that under another provision of the California Constitution, section 19 of Article XI, municipalities can *operate* certain public works and that section 22 of Article XII gives the state Public Utilities Commission no jurisdiction over them. *Polk v. City of Los Angeles* (1945) 26 Cal.2d 519, 539, 159 P.2d 931, quoted in the petition (p. 23) is one of the California cases explicit on this point.

Further, while a municipal waterworks or bus line might be of purely local interest and hence a "municipal affair," such reasoning could not be applied to an international airport. This is shown by the California cases cited by the Court of Appeals (Appendix, Petition for Certiorari, pp. v-vii, and supra 5), concerning which the court said (Appendix, Petition for Certiorari, p. vi):

> "The facts of the instant case place it much farther outside the orbit of a 'municipal affair' than do those of any of the cases, supra.
>
> The airport is not a strictly local affair. It is part of a global system of air transportation."

2. No jurisdiction in Civil Aeronautics Board to regulate airport charges for use of airport facilities.

Here the decision of the Court of Appeals is said to raise "the question of whether the Civil Aeronautics Board has jurisdiction to regulate rates and charges for common use facilities at airports serving interstate air

carriers." The opinion of the Court of Appeals does not discuss such a question because the City first raised it by petition for rehearing.

The Civil Aeronautics Act answers the City's question in the negative. A quick panoramic view of the statute can be had by looking at the outline of subchapters and headings in the United States Code (49 U.S.C.A. 401 et seq.). Subchapter 4 deals with "*Air Carrier* Economic Regulation." The statute gives the Civil Aeronautics Board authority to regulate *interstate and international air carriers,* and as to rates, gives authority to regulate *the rates of such carriers* (see 49 U.S.C. 482, 484; see also 642(d) quoted in the appendix to this brief, pp. vi-vii).

In the report of the Senate Committee on Commerce preceding the enactment of the Civil Aeronautics Act, the Committee said:

> "The bill provides for the usual system of economic regulation of air-transportation companies and applies to all air carriers, who operate as common carriers or who transport mail by air. The legislation is adapted to the special characteristics of transportatic by air and is, at present, carried no further than is necessary in the interests of the public and of civil aeronautics" (S. Rept. 1661, 75th Cong., 3d Sess., Apr. 20, 1938).

Section 401 of the statute giving definitions includes the following (49 U.S.C. 401(10)):

> "'Air transportation' means interstate, overseas, or foreign air transportation or the transportation of mail by aircraft."

The statute does not provide for regulating charges by *airports* for the use of airport facilities.[8] It may be noted in this regard that a complaint case before the Civil Aeronautics Board was recently brought by several airlines, who alleged illegality in sliding scale landing charges made by the Miami International Airport. The Board dismissed the complaint as outside its jurisdiction (In the Matter of the Complaint of Various Air Carriers and Foreign Air Carriers Serving Miami, Florida, Civil Aeronautics Board, Docket No. 7324, Order No. E-9911, January 12, 1956).

3. No conflict with decisions of the Supreme Court.

The decision below is said to permit "discrimination" contrary to decisions of the Supreme Court, presumably *United States v. Baltimore & O. R. Co.* (1948) 333 U.S. 169, and other cases cited later in the petition (pp. 15-16).

All these cases involved carrier-shipper relations, which the case at bar does not. All but one were under the Interstate Commerce Act. Decisions under that Act, however, are not controlling under statutes with different provisions (*United Gas Pipe Line Company v. Mobile Gas Service Corporation* (Feb. 27, 1956) 24 U.S. Law Week 4090, 4091, involving the Natural Gas Act).[9]

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[8]Regulatory authority, of course, cannot be implied but must rest upon some explicit provision in the statute (*Stark v. Wickard* (1944) 321 U.S. 288; *Siler v. Louisville & Nashville R. R. Co.* (1909) 213 U.S. 175, 194).

[9]"In this respect [permitting rates to be established initially by contract], the Act is in marked contrast to the Interstate Commerce Act, which in effect precludes private rate agreements by its requirement that the rates to all shippers be uniform, a requirement which made unnecessary any provision for filing contracts. See *Armour Packing Co.*

There is no pleading, no evidence, and no finding of discrimination in the case at bar. The record shows only that the rates in the 1942 contract are lower than those in the 1951 "schedule" of the City. But difference and discrimination are not synonymous terms.[10] A contract authorized by law is not an illegal "discrimination". The very existence of statutory contracting authority contemplates that the terms of contracts may differ; otherwise the grant of authority is meaningless (see *United Gas Pipe Line Company v. Mobile Gas Service Corporation*, quoted below, n. 9).

4. No conflict between circuits.

This alleged conflict is with *S. S. W., Inc. v. Air Transport Ass'n of America* (D.C.Cir. 1951) 191 F.2d 658 (Petition for Certiorari, p. 28). In that case a "non-scheduled" interstate air carrier brought suit under the anti-trust laws against certificated carriers and their trade association, alleging conspiracy to monopolize air-borne

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v. United States, 209 U.S. 56. The Commission in its brief recognizes this basic difference between the two Acts and notes the differing natures of the industries which gave rise to it. The vast number of retail transactions of railroads made policing of individual transactions administratively impossible; effective regulation could be accomplished only by requiring compliance with a single schedule of rates applicable to all shippers. On the other hand, only a relatively few wholesale transactions are regulated by the Natural Gas Act and these typically require substantial investment in capacity and facilities for the service of a particular distributor."

The petition for certiorari points out that twelve scheduled airlines now use the San Francisco Airport (p. 3).

[10] *U.S. v. Wabash R. Co.* (1944) 321 U.S. 403, 411; *Barringer & Co. v. United States* (1942) 319 U.S. 1, 7; *Texas & Pacific Ry. Co. v. U.S.* (1933) 289 U.S. 627; *Live Oak W. U. Assn. v. Railroad Com.* (1923) 192 Cal. 132, 219 Pac. 65; *Durant v. City of Beverly Hills* (1940) 39 Cal.App.2d 133, 102 P.2d 759.

commerce by various illegal practices (191 F.2d 660). The court held that the same act by an air carrier might violate the antitrust laws and also the Civil Aeronautics Act; however, that there would be no antitrust violation in a practice of air carriers which the Civil Aeronautics Board, acting within its jurisdiction, found to be legal under the Civil Aeronautics Act (191 F.2d 664); hence that there was an administrative remedy to exhaust, and that the antitrust suit should be stayed pending the Board's determination as to the validity under the Civil Aeronautics Act of the practices charged (191 F.2d 664).

The above case, we submit, is so remote from the case at bar as to have no bearing on it. The City argues that TWA was under obligation to get the 1942 contract approved by the Civil Aeronautics Board (Petition for Certiorari, pp. 28-29). The statute contains no such requirement. The City cites section 412 (49 U.S.C. 492), but that section by its terms is not applicable. It relates to pooling and other agreements *"between such air carrier, foreign air carrier, or other carrier."*

B. IT IS IMMATERIAL IN THE CASE AT BAR WHETHER OR NOT THE AIRPORT IS A PUBLIC UTILITY

(Answering Petition for Certiorari, pp. 9-12).

As held by the Court of Appeals the statutory authority of the City to make the contract in suit establishes its validity regardless of coexisting authority in the City (if such there was) to deal with the subject matter by rate regulation. Whether the airport is a public utility and what rate regulatory authority the City has there are not material questions in the case at bar (supra 7).

For the same reason the City's citations at page 10 of the petition for certiorari are immaterial. It may be added, however, that the cases do not hold that a municipal airport is necessarily a public utility (as the City says), but rather that it is a *public enterprise* justifying "the expenditure of municipal funds, the use of the tax power, the use of public properties or the use of condemnation proceedings" (Opinion, Court of Appeals, Appendix, Petition for Certiorari, p. vii, discussing the same cases now cited).[11]

C. THERE IS NO LEGAL OBJECTION TO FIXING PUBLIC UTILITY RATES BY CONTRACT WHERE THE STATUTE SO AUTHORIZES

(Answering Petition for Certiorari, pp. 13-16).

Contrary to the City's argument here made, public utility rates can be fixed by contract if the statute so authorizes (*United Gas Pipe Line Company v. Mobile Gas Service Corporation* (Feb. 27, 1956) 24 U.S. Law Week 4090, 4091, and many cases cited by the Court of Appeals; see also supra 6-7).

The petition cites the California Public Utilities Code, a section of the Federal Airport Act, two sections of the

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[11]As previously shown, the City does not treat the "airport" as a public utility, and claims utility rate-making power over only a small segment of airport operation (supra 11). The claim reduces itself to a complete absurdity in view of the charter provisions. Under section 130 of the charter (Appendix, this brief, p. v) the rates for a municipally owned public utility ("the airport" according to the City) must be sufficient to pay all expenses, including bond interest and amortization. The provision is simply impossible to apply where the bulk of airport revenue comes from unregulated sources, and utility rate-making power is asserted only with respect to the use of certain facilities by the airlines.

Civil Aeronautics Act, several decisions of the Supreme Court, and several state cases as prohibiting "discrimination." There is, however, no pleading, evidence or finding of discrimination in the case at bar (supra 16). The Supreme Court cases are not in point, as already shown (supra 15-16). For reasons already given, the case involves no infringement of federal statute (supra 3, 13-15). The state cases were distinguished by the Court of Appeals (Appendix, Petition for Certiorari, p. x). They all involved situations in which there was no statutory contracting authority, and one of them, *Limoneira Co. v. Railroad Commission* (1917) 174 Cal. 232, 162 Pac. 1033, quoted by the Court of Appeals (Appendix, Petition for Certiorari, pp. x-xi), expressly points out the distinction in situations where such authority exists.

D. THE 1942 CONTRACT WAS NOT SUBJECT TO CHANGE BY RATE REGULATION

(Answering Petition for Certiorari, pp. 16-18).

Of course, if the pertinent statute so provides, a contract may be initially valid, yet subject to change by the regulatory body, as is illustrated by *United Gas Pipe Line Company v. Mobile Gas Service Corporation* (Feb. 27, 1956) 24 U.S. Law Week 4090, 4091, already cited, and by *Texarkana v. Arkansas Gas Co.* (1939) 306 U.S. 188, 199-201. In the case at bar, however, the contract was authorized by statute and there was no statute subjecting it to subsequent change by regulation. Such a situation is governed by the cases cited by the Court of Appeals.

The cases cited on page 18 of the petition for certiorari (*Pinney & Boyle Co. v. L. A. Gas etc. Corp.* (1914) 168 Cal. 12, 141 Pac. 620) were cited to and distinguished by the Court of Appeals (Appendix, Petition for Certiorari, pp. ix-x). Typically, they were cases where a privately owned utility and a consumer executed a contract for utility service without specific statutory authorization, before there was a regulatory statute, or before the statute made regulation mandatory. None involved contracts authorized by statute for use of a municipally owned facility. The cases cited are simply not in point.

E. THE OPERATION OF THE AIRPORT IS NOT A "MUNICIPAL AFFAIR" OUTSIDE THE SCOPE OF THE GENERAL LAWS OF THE STATE

(Answering Petition for Certiorari, pp. 19-27).

The City here cites section 19 of Article XI of the California Constitution, under which it says that the airport is a "municipal affair." The cited provision, however, is not a municipal affair provision, as is apparent from its terms, and as was specifically decided in *Pac. Tel. & Tel. Co. v. City of Los Angeles* (1955) 44 Cal. 2d 272, 281, 282 P.2d 36. This case overruled the precise contention that under section 19 of Article XI the granting of a franchise to engage in the telephone business is a municipal affair, and hence subject to municipal control and not subject to the general laws of the state.

The absolute lack of merit in the argument that under California law an international airport is a "municipal affair" has, we submit, been demonstrated (supra 4-5).

F. THE VALIDITY OF THE CONTRACT DOES NOT DEPEND ON ANY ADMINISTRATIVE ACTION TO BE TAKEN BY THE CIVIL AERONAUTICS BOARD

(Answering Petition for Certiorari, pp. 27-31).

The City here argues that this case should be abated until TWA gets the 1942 contract approved by the Civil Aeronautics Board, citing section 412 of the Civil Aeronautics Act (49 U.S.C. 492). As already shown, this section relates only to *contracts between air carriers* (supra 17).

Several sections of the Civil Aeronautics Act cited at the bottom of page 29 of the petition are not quoted, but the bare reference made by the petition to their subject matter is enough to show them inapplicable.

The case of *S. S. W., Inc. v. Air Transport Ass'n of America* (D.C.Cir. 1951) 191 F.2d 658, creates no conflict with and is not relevant to the case at bar as already shown (supra 15-16).

As noted before, all these points were first raised by the City in its petition for rehearing in the Court of Appeals.

G. THE STATE PUBLIC UTILITIES COMMISSION HAS NO JURISDICTION IN THIS MATTER

(Answering Petition for Certiorari, pp. 31-34).

The City here claims that "If the operation of the airport is neither a municipal nor federal affair, it must be a state affair controlled by the Public Utilities Commission of the State of California." Under the California Constitution (Art. XII, sec. 23), however, the state Commission has no jurisdiction over municipally owned pub-

lic works. This is explicitly held in California cases cited in the petition for certiorari (see, for example, *Polk v. City of Los Angeles* (1945) 26 Cal.2d 519, 539, 150 P.2d 931; Petition for Certiorari, p. 23). The jurisdiction of the State Public Utilities Commission extends only to the regulation of intrastate rates of common carriers by air (*People v. Western Air Lines, Inc.* (1954) 42 Cal.2d 621, 268 P.2d 723).

CONCLUSION

(Answering Petition for Certiorari, pp. 34-35).

This case turns on questions of California law, which the Court of Appeals decided correctly. The belatedly raised questions under federal acts are insubstantial. There is no conflict of decisions. We respectfully submit that the petition for writ of certiorari should be denied.

Dated: San Francisco, California,
April 5, 1956.

LOYD WRIGHT,
EUGENE M. PRINCE,
FRANCIS R. KIRKHAM,
NOEL DYER,
Attorneys for Respondent.

(Appendix Follows.)

Appendix

CONSTITUTION OF THE STATE OF CALIFORNIA

Article XI, Section 6 [in part]:

"Municipal corporations

Sec. 6. * * * Cities and towns hereafter organized under charters framed and adopted by authority of this Constitution are hereby empowered, and cities and towns heretofore organized by authority of this Constitution may amend their charters in the manner authorized by this Constitution so as to become likewise empowered hereunder, to make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in their several charters, and in respect to other matters they shall be subject to and controlled by general laws."

Article XI, Section 8(j) [in part]:

"Municipal Affairs

It shall be competent in any charter framed under the authority of this section to provide that the municipality governed thereunder may make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general laws."

CALIFORNIA MUNICIPAL AND COUNTY AIRPORT LAW

Cal.Stats. 1927, c. 267, p. 485:

"**Section 1.** Any city and county, or county, or city operating under a freeholders' charter, or otherwise, or any town, or any municipal corporation, in the State of California, is hereby authorized and empowered to acquire by purchase, condemnation, donation, lease or otherwise real or personal property, or to use any real property owned by it, or which it may hereafter acquire, within or without its corporate limits for a site upon which an airport or airports may be maintained and upon which any such city and county or county or city or town or municipal corporation may erect and maintain or permit the erection and maintenance of hangars, mooring masts, flying fields, and all places for flying take-off and landing of aircraft and the storage of the same when not in active use, together with signal lights, radio equipment, service shops, conveniences, appliances, works, structures and other air navigation facilities, now known or hereafter invented, of such number and character and in such places as may be necessary or convenient, and to levy taxes for the purpose of raising funds to acquire lands for the purposes mentioned in this act and to pay the principal and interest of any bonds issued pursuant hereto.

[Here follow provisions allowing municipalities to use lands held for park purposes for airports.]

Section 2. [Provides for incurring indebtedness to carry out purposes of Section 1].

Section 3. [Provides procedure for issuance of bonds for airport purposes.]

Section 4. In connection with the erection or maintenance of any such airport or airports, or air navigation facilities, any such city and county, or county, or city operating under a freeholders charter or otherwise, or town, or any municipal corporation, shall have the power and jurisdiction to regulate the receipt, deposit and removal, the embarkation or debarkation of passengers or property to and from such landing places or moorage as may be provided, to exact and require charges, fees and tolls, together with a lien to enforce their payment, to lease or assign for operation such space or area, appurtenances, appliances or other conveniences necessary or useful in connection therewith, to own and operate municipal aircraft, to employ pilots, to provide rules and regulations covering the use of such airport and facilities and the use of other property or means of transportation within or over the said airport, to perform any duties necessary or convenient for the regulation of air traffic, to enter into contracts or otherwise cooperate with the federal government or other public or private agencies, and otherwise exercise such powers as may be required or convenient in the promotion of aeronautics and the furtherance of commerce and navigation by air.

Section 5. All acts and parts of acts inconsistent with the provisions of this act are hereby repealed."

(This statute was repealed in 1949, except sec. 3, Cal. Stats. 1949, c. 81, p. 327, but similar provisions immediately effective were included in the Government Code, secs. 50,470 et seq.)

CHARTER OF THE CITY AND COUNTY OF SAN FRANCISCO

Cal.Stats. 1931, c. 56, p. 2978:

"Powers of the City and County.

Section 2 [in part]. The City and County of San Francisco * * * may, subject to the restrictions contained in this charter, purchase, receive, hold and enjoy, sell, lease and convey real and personal property."

"Lease of City Property.

Section 93 [as worded on October 1, 1942, Cal.Stats. 1931, p. 3035, provided, among other things, for lease terms not to exceed 20 years.]

Cal.Stats. 1931, c. 56, p. 3047.

"General Powers and Duties of Commission.

Section 121 [in part]. The public utilities commission shall have charge of the construction, management, supervision, maintenance, extension, operation and control of all public utilities and other properties used, owned, acquired, leased or constructed by the city and county, including airports, for the purpose of supplying any public utility service to the city and county and its inhabitants, to territory outside the limits of the city and county, and to the inhabitants thereof."

Cal.Stats. 1931, c. 56, p. 3051.

"Rates.

Section 130 [in part]. The Commission shall have power to fix, change and adjust rates, charges or fares for the furnishing of service by any utility under its jurisdiction,

and to collect by appropriate means all amounts due for said service, and to discontinue service to delinquent consumers, and to settle and adjust claims arising out of the operation of any said utilities.

* * * * *

Rates for each utility shall be so fixed that the revenue therefrom shall be sufficient to pay, for at least the succeeding fiscal year, all expenses of every kind and nature incident to the operation and maintenance of said utility, together with the interest and sinking fund for any bonds issued for the acquisition, construction or extension of said utility; * * *"

FEDERAL CIVIL AERONAUTICS ACT OF 1938

June 23, 1938, 52 Stat. 977, 49 U.S.C. 401 et seq.

49 U.S.C. 453. "Expenditure of Federal funds [in part]

* * * There shall be no exclusive right for the use of any landing area or air navigation facility upon which Federal funds have been expended."

49 U.S.C. 483. "Tariffs of air carriers [in part]

(a) Every air carrier and every foreign air carrier shall file with the Board, and print, and keep open to public inspection, tariffs showing all rates, fares, and charges for air transportation between points served by it, and between points served by it and points served by any other air carrier or foreign air carrier when through service and through rates shall have been established, and showing to the extent required by regulations of the Board, all classifications, rules, regulations, practices, and services in connection with such air transportation. * * *"

49 U.S.C. 484. "Rates for carriage of persons and property [in part]

(a) It shall be the duty of every air carrier * * * to establish, observe, and enforce just and reasonable individual and joint rates, fares, and charges, and just and reasonable classifications, rules, regulations, and practices relating to such air transportation; * * *

(b) No air carrier or foreign air carrier shall make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, locality, or description of traffic in air transportation in any respect whatsoever or subject any particular person, port, locality, or description of traffic in air transportation to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

(c) The Board is empowered and directed to investigate and report to the Congress within one year from the effective date of this section, to what extent, if any, the Federal Government should further regulate the rates, fares, and charges of air carriers engaged in foreign air transportation, and the classifications, rules, regulations, and practices affecting such rates, fares, or charges."

49 U.S.C. 642. "Complaints to and investigations by Board [in part]

* * * * *

(d) Whenever, after notice and hearing, upon complaint, or upon its own initiative, the Board shall be of the opinion that any individual or joint rate, fare, or charge demanded, charged, collected or received by any air carrier for interstate or overseas air transportation,

or any classification, rule, regulation, or practice affecting such rate, fare, or charge, or the value of the service thereunder, is or will be unjust or unreasonable, or unjustly discriminatory, or unduly preferential, or unduly prejudicial, the Board shall determine and prescribe the lawful rate, fare, or charge (or the maximum or minimum, or the maximum and minimum thereof) thereafter to be demanded, charged, collected, or received, or the lawful classification, rule, regulation, or practice thereafter to be made effective: *Provided,* That as to rates, fares, and charges for overseas air transportation, the Board shall determine and prescribe only a just and reasonable maximum or minimum or maximum and minimum rate, fare, or charge."

FEDERAL AIRPORT ACT

May 13, 1946, 60 Stat. 170, 49 U.S.C. 1101 et seq.

49 U.S.C. 1110. "Project sponsorship; requirements; contracts between Administrator and public agencies [in part]

As a condition precedent to his approval of a project under this chapter, the Administrator shall receive assurances in writing, satisfactory to him, that—

(1) the airport to which the project relates will be available for public use on fair and reasonable terms and without unjust discrimination;"

[Seven other subsections follow.]

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1955

No. 765

CITY AND COUNTY OF SAN FRANCISCO,
a municipal corporation, et al.,
Petitioners,

vs.

TRANS WORLD AIRLINES, INC.,
a corporation,
Respondent.

BRIEF OF PETITIONER, CITY AND COUNTY OF SAN FRANCISCO, IN REPLY TO BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

I.

INTRODUCTION; REASON FOR FILING.

Petitioner, in reply to Respondent's Brief in Opposition to Petition for a Writ of Certiorari (hereinafter referred to as Respondent's Brief in Opposi-

tion), files this brief under Rule 24, subparagraph 4, Revised Rules of the United States Supreme Court.

The respondent cites two decisions of this Court which, although decided on February 27, 1956, were not available to Petitioner in time to be discussed in the Petition for Writ of Certiorari, filed on March 14, 1956. Those cases are *Federal Power Commission v. Sierra Pacific Power Company,* ..... U.S. ....., 100 L.ed. (Adv. p. 300), and *United Gas Pipe Line Company v. Mobile Gas Service Corporation,* ..... U.S. ....., 100 L.ed. (Adv. p. 291).

II.

CASES CONSTRUING THE NATURAL GAS ACT OR THE FEDERAL POWER ACT ARE NOT IN POINT.

The case entitled *United Gas Pipe Line Company v. Mobile Gas Service Corporation,* ..... U.S. ....., 100 L.ed. (Adv. p. 291), is a construction of the powers of the Federal Power Commission and its procedures under the Natural Gas Act, 52 Stat. 821, 15 U.S.C. §§717, et seq. In footnote 9, pages 15 and 16, of Respondent's Brief in Opposition, language is quoted from *United Gas Pipe Line Co. v. Mobile Gas Service Corporation* (supra) which, in distinguishing the Natural Gas Act from the Interstate Commerce Act, is to the effect that the few wholesale transactions regulated by the Natural Gas Act typically require substantial investment in facilities. The only investment required of an airline to make use of common use facilities at the San Francisco International Air-

port is in the right to operate an aircraft. All operators of aircraft, whether scheduled or nonscheduled, air carriers, or private operators, many planes or one, have a right to use the common use facilities at the airport, subject to payment of a reasonable charge. (Federal Airport Act, 49 U.S.C. 1110, Respondent's Brief in Opposition, Appendix p. xvii.) There is no investment on the part of an airline in the common use facilities, for these are supplied by the City and County of San Francisco with taxpayers' money. True, an airline may make an investment in base facilities for its own use, but Petitioner does not make the contention that that portion of the agreement between Trans World Airlines and Petitioner, granting to Trans World Airlines airport facilities not used in common with other operators of aircraft, is subject to utility rate regulation. Factually, when this case was heard in the District Court, Petitioner had no investment in base facilities at the Airport. (R. p. 15, par. 1.) This case is therefore not in point in deciding questions arising under provisions in the California Constitution and the Charter of the City and County of San Francisco, which provisions are wholly dissimilar to those of the Natural Gas Act.

On page 8 of Respondent's Brief in Opposition the case of *Federal Power Commission v. Sierra Pacific Power Company*, ___ U.S. ___, 100 L.ed. (Adv. p. 300), is cited to sustain the footnote proposition that City could not affect the contract with Trans World Airlines by its own unilateral action in filing

a new "Schedule of Rates." That proposition ignores the fact that the schedule of rates and charges of November 20, 1950, as well as the prior schedules of June 23, 1941 and November 25, 1946 were adopted after published notice of hearing, and hearing at which all interested parties had an opportunity to be heard (R. pp. 622-625), in accordance with the Charter of the City and County of San Francisco, section 130. (Appendix, pp. iii-iv.) It also ignores the legal controversy in *Federal Power Commission v. Sierra Pacific Power Company,* supra, in that only procedural requirements before the Federal Power Commission and powers of that body under Title II of the Federal Power Act (49 Stat. 847, 16 U.S.C. §§284, et seq.) were in issue there.

No confusion should arise by reason of the coincidence that the rate-fixing body in this instance happens to be the Public Utilities Commission, also having jurisdiction over the utility itself. In the exercise of its rate-fixing power, the Public Utilities Commission of the City and County of San Francisco is acting as a public rate-fixing body even though it is at the same time engaged in a function as the operator of the utility. (Charter of City and County of San Francisco, §§121 and 130; Appendix, pp. i-iv; Cf. *Connett v. City of Jerseyville* (C.C.A. 7, 1940), 110 Fed. 2d 1015, 1019.)

CONCLUSION.

Neither *Federal Power Commission v. Sierra Pacific Power Company,* supra, nor *United Gas Pipe Line Co. v. Mobile Gas Service Corp.,* supra, are in point in this case. The differences between the Interstate Commerce Act and the Natural Gas Act discussed in the *United Gas Pipe Line* case and noted above, seem only to strengthen the Petitioners' carrier-shipper analogy to the relations between airport operators and aircraft operators.

Dated, San Francisco, California,
April 11, 1956.

Respectfully submitted,

DION R. HOLM,
City Attorney of the City and County of San Francisco,
THOMAS M. O'CONNOR,
Public Utilities Counsel of the City and County of San Francisco,
FRANK J. NEEDLES,
Deputy City Attorney of the City and County of San Francisco,
Attorneys for Petitioner City and County of San Francisco.

(Appendix Follows.)

Appendix

CHARTER, CITY AND COUNTY OF SAN FRANCISCO.

GENERAL POWERS AND DUTIES OF COMMISSION.

"Section 121. The public utilities commission shall have charge of the construction, management, supervision, maintenance, extension, operation and control of all public utilities and other properties used, owned, acquired, leased or constructed by the city and county, including airports, for the purpose of supplying any public utility service to the city and county and its inhabitants, to territory outside the limits of the city and county, and to the inhabitants thereof.

The commission shall locate and determine the character and type of all construction and additions, betterments and extensions to utilities under its control, and shall determine the policy for such construction or the making of such additions, betterments and extensions from the public funds under its jurisdiction; provided that in each such case it shall secure the recommendation of the manager of utilities, which shall be presented in writing and shall include analyses of cost, service and estimated revenues of all proposed or feasible alternatives in cases where it is deemed by the manager that such alternatives exist.

The commission shall also have power to enter into contract for the furnishing of heat, light and power for municipal purposes, and to supervise the performance and check the monthly bills under such contract.

The Commission shall have full power and authority to enter into such arrangements and agreements as it shall deem proper for the joint use with any other person, firm or corporation, owning or having jurisdiction over poles, conduits, towers, stations, aqueducts, reservoirs and tracks for the operation of any of the utilities under its jurisdiction. It may make such arrangements as it shall deem proper for the exchange of transfer privileges with any privately owned transportation company or system which shall tend toward the betterment of transportation service.

The commission shall observe all city and county ordinances and the regulations of the department of public works relative to utility openings, structures and poles in streets and other public places, as well as all ordinances and regulations relative to barricades, construction lights, refilling excavations and replacing and maintaining street pavements; and in connection with all such matters the said commission shall be subject to the same inspection rules and pay fees to the proper department in the same manner and at the same rates as any private person or corporation.

The commission shall have charge of all valuation work relative or incidental to purchase proceedings initiated by the city and county for the acquisition of any public utility.

Foreign trade zones, as may be authorized by acts of Congress to be located in the city and county, are hereby declared to be public utilities within the meaning of this charter. A bonded indebtedness for the

construction, completion or acquisition of foreign trade zones and the acquisition of necessary lands, buildings and equipment authorized by the electors in accordance with the provisions of this charter shall be exclusive of the bonded indebtedness of the city and county limited by this charter."

RATES.

"Section 130. The commission shall have power to fix, change and adjust rates, charges or fares for the furnishing of service by any utility under its jurisdiction, and to collect by appropriate means all amounts due for said service, and to discontinue service to delinquent consumers and to settle and adjust claims arising out of the operation of any said utilities.

Rates may be fixed at varying scales for different classes of service or consumers. The commission may provide for the rendition of utility service outside the limits of the city and county and the rates to be charged therefor which may include proportionate compensation for interest during the construction of the utility rendering such service.

Before adopting or revising any schedule of rates or fares, the commission shall publish in the official newspaper of the city and county for five days notice of its intention so to do and shall fix a time for a public hearing or hearings thereon, which shall be not less than ten days after the last publication of said notice, and at which any resident may present his objection to or views on the proposed schedule of rates, fares or charges.

Rates for each utility shall be so fixed that the revenue therefrom shall be sufficient to pay, for at least the succeeding fiscal year, all expenses of every kind and nature incident to the operation and maintenance of said utility, together with the interest and sinking fund for any bonds issued for the acquisition, construction or extension of said utility; provided that, should the commission propose a schedule of rates, charges or fares for said utility which shall not produce such revenue, it may do so with the approval of the board of supervisors, by a two-thirds vote and it shall thereupon be incumbent to provide by tax levy for the additional amount necessary to meet such deficit. All other changes in rates, charges or fares as proposed by the commission shall be submitted by the commission to the board of supervisors for approval, and, except as in this section otherwise provided, it shall require a two-thirds vote of the board of supervisors to reject the rate changes as proposed by the commission, and if so rejected, such proposed changes in schedules of rates, charges or fares shall be returned to the commission for revision. If the supervisors shall fail to act on any such proposed schedule within thirty days, the schedule shall thereupon become effective."